

4318

1 IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA  
2 IN AND FOR THE CITY AND COUNTY OF SAN FRANCISCO  
3 BEFORE THE HONORABLE JOHN E. MUNTER, JUDGE  
4 DEPARTMENT NO. 505  
5

6 LESLIE J. WHITELEY AND )  
7 LEONARD WHITELEY, )  
8 PLAINTIFFS, )  
9 VS. ) NO. 303184  
10 RAYBESTOS-MANHATTAN, INC., ET )  
11 AL., )  
12 DEFENDANTS. )  
13 \_\_\_\_\_ )  
14

15 REPORTER'S TRANSCRIPT OF PROCEEDINGS  
16 FRIDAY, FEBRUARY 25, 2000  
17 (VOLUME 31, PAGES 4318-4493)  
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23 REPORTED BY: JUDITH ANN OSSA, CSR 2310  
24 OFFICIAL REPORTER  
25  
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27  
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4319

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1 FRIDAY, FEBRUARY 25, 2000 9:15 P.M.  
2 (THE FOLLOWING PROCEEDINGS WERE HELD IN  
3 CHAMBERS, OUTSIDE THE PRESENCE OF THE JURY)

4 THE COURT: WE ARE ON THE RECORD IN CHAMBERS FOR  
5 PURPOSES OF MAKING A RECORD OF AN INSTRUCTION THAT THE COURT  
6 IS GOING TO GIVE THE JURY IN A COUPLE OF MINUTES.

7 YESTERDAY, THE COURT RECEIVED A QUESTION FROM  
8 JUROR NO. 15 THAT SAID:

9 "HOW ARE WE SUPPOSED TO VOTE ON PROP. 28 IF WE  
10 ARE NOT ALLOWED TO READ ANYTHING ABOUT  
11 CIGARETTES?"

12 COUNSEL PROVIDED THE COURT YESTERDAY -- PURSUANT  
13 TO THE AGREEMENT OF COUNSEL YESTERDAY, MY CLERK, VERA MU,  
14 TOLD THAT JUROR THAT THE COURT WOULD RESPOND TODAY. AND  
15 THAT WAS AT EVERYBODY'S AGREEMENT HERE.

16 AND THE PURPOSE OF IT WAS TO GIVE US TIME TO TAKE  
17 A LOOK AT THE MATERIALS THAT ARE SENT OUT BY THE REGISTRAR  
18 OF VOTERS TO PEOPLE ON PROP 28.

19 AND, COUNSEL, I GUESS, FOR THE DEFENSE, OBTAINED  
20 THAT YESTERDAY, AND SHARED IT WITH OTHER COUNSEL AND WITH  
21 THE COURT.

22 AND I HAVE READ THAT AS WELL, AND I WILL PUT A  
23 COUPLE OF EXAMPLES OF WHAT IT SAYS IN THE RECORD, BECAUSE  
24 IT'S THE BASIS FOR WHAT THE COURT PROPOSES TO DO.

25 THERE IS THIS KIND OF LANGUAGE IN THERE:

26 "TOBACCO COMPANIES DON'T CARE ABOUT OUR  
27 CHILDREN. THEY ONLY CARE ABOUT THEIR PROFITS.  
28 PROP. 28 WOULD REPEAL PROP 10. THE TOBACCO

4322  
1 COMPANIES ARE SPONSORING, SUPPORTING AND PAYING  
2 FOR PROP. 28 FOR ONE REASON AND ONE REASON ONLY,  
3 TO PROTECT THEIR PROFITS. ONCE AGAIN, THE  
4 TOBACCO INDUSTRY IS TRYING TO MISLEAD THE  
5 PUBLIC. THEY LIED WHEN THEY SAID SMOKING ISN'T  
6 HARMFUL."

7 THEN IT GOES ON AND SAID THIS:

8 "PROP. 28 WOULD CUT FUNDING FOR ANTISMOKING  
9 EFFORTS THAT WILL HELP PREVENT SMOKING BY  
10 PREGNANT WOMEN AND HELP AVOID THOUSANDS OF  
11 PREMATURE BIRTHS PER YEAR."

12 AGAIN: "TIME AND AGAIN, THE TOBACCO GIANTS HAVE  
13 SHOWN THAT THEY'LL DO ANYTHING" --ITALIZED --

14 "TO PROTECT THEIR PROFITS -- INCLUDING LYING TO  
15 CONGRESS, COVERING UP THE HEALTH FACTS ABOUT  
16 TOBACCO, MARKETING CIGARETTES TO CHILDREN, AND  
17 USING FALSE ADVERTISING. THE TOBACCO INTERESTS  
18 DON'T CARE THAT THE TOBACCO TAX THEY WANT TO  
19 ELIMINATE WITH PROP. 28 IS ALREADY HELPING ENSURE  
20 A BRIGHTER FUTURE FOR OUR CHILDREN."

21 AGAIN: "PROP 28 WILL SLASH OVER \$680 MILLION A  
22 YEAR FROM CRITICAL PROGRAMS THAT BENEFIT OUR  
23 CHILDREN, INCLUDING:" AND THEN THERE IS A LIST OF

24 THEM.

25 AND THEN IT GOES ON: "THESE PROGRAMS PREVENT  
26 EXPENSIVE AND TRAGIC HEALTH PROBLEMS. FOR  
27 EXAMPLE, SMOKING DURING PREGNANCY CAUSES  
28 THOUSANDS OF BABIES TO BE BORN PREMATURELY EACH

4323  
1 YEAR, AND GREATLY INCREASES THE RISK OF SUDDEN  
2 INFANT DEATH SYNDROME."

3 THEN AGAIN: "THE TOBACCO COMPANIES HAVE MILLIONS  
4 OF DOLLARS ON THE LINE -- SINCE PROP. 10'S  
5 PASSAGE, TOBACCO SALES IN THE STATE HAVE BEEN CUT  
6 BY 30 PERCENT. THAT IS WHY THE TOBACCO COMPANIES  
7 WILL TRY EVERY TRICK IN THE BOOK TO GET YOU TO  
8 VOTE FOR PROP. 28. THEY'LL TRY TO SCARE YOU.

9           THEY'LL TRY TO CHANGE THE SUBJECT. SOME WILL  
10          EVEN SPEND HUNDREDS OF MILLIONS OF DOLLARS ON  
11          'IMAGE' ADS TO CONVINCE YOU THAT THEY CARE ABOUT  
12          THE HEALTH AND WELFARE OF YOUR COMMUNITY."

13          NOW, THOSE COMMENTS NOT ONLY ARE DIRECTLY ON  
14          POINT ON THE SUBJECT MATTER OF THE CLAIMS THAT ARE MADE IN  
15          THIS LAWSUIT, BUT ALSO, EVEN BEYOND THAT, THEY REFERENCE  
16          INFORMATION THAT THE COURT HAS EXCLUDED; FOR EXAMPLE, THE  
17          ALLEGATION OF LYING TO CONGRESS.

18          ANOTHER THING IS THAT THIS WOULD VIOLATE THE  
19          PREEMPTION DOCTRINE IN TERMS OF TALKING ABOUT IMAGE ADS TO  
20          CONVINCE PEOPLE.

21          NOT ONLY DOES THIS, IN A VERY ARGUMENTATIVE WAY,  
22          REINFORCE AND MAKE THE PLAINTIFFS' ALLEGED POINTS IN THIS  
23          CASE, BUT IT DOES IT ALSO IN A WAY THAT WOULD, IN EFFECT,  
24          OVERRULE SOME OF THE COURT'S RULINGS IN THIS PARTICULAR  
25          CASE.

26          AND TO ADD TO THAT, IF YOU LOOK AT THIS PAMPHLET,  
27          THE PARTIES WHO ARE MAKING THE ARGUMENTS AGAINST THE TOBACCO  
28          COMPANIES ARE THE STATE PRESIDENT OF AARP, THE CHAIR OF THE

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1          AMERICAN LUNG ASSOCIATION OF CALIFORNIA AND THE PRESIDENT OF  
2          THE CALIFORNIA FEDERATION OF TEACHERS.

3          THE ARGUMENTS THAT ARE MADE IN SUPPORT OF THE  
4          TOBACCO COMPANIES ARE MADE SOLELY BY SOMEBODY CALLED THE  
5          PRESIDENT OF CIGARETTES CHEAPER! STORES.

6          SO IT IS REASONABLE TO ASSUME THAT THE  
7          SPONSORSHIP BEHIND THE COMPETING VIEWS IS NOT NECESSARILY  
8          GOING TO BE BALANCED IN EVERY JUROR'S MIND.

9          SO GIVEN THAT, AND RECOGNIZING THAT THIS IS A  
10          VERY IMPORTANT AND SERIOUS QUESTION, BECAUSE IT INVOLVES THE  
11          ISSUE OF THE RIGHT OF JURORS TO VOTE AND TO DO SO ON AN  
12          INFORMED BASIS, THE COURT NEVERTHELESS BELIEVES THAT IT HAS  
13          TO ANSWER THIS QUESTION BY PRECLUDING JUROR REFERENCE TO  
14          MATERIALS SUCH AS THIS PAMPHLET ON PROP. 28.

15          SO LET ME ASK ALL COUNSEL -- WE'VE DISCUSSED THIS  
16          OFF THE RECORD, AND I HAVE PREPARED A STATEMENT THAT I'M  
17          GOING TO MAKE TO THE JURY, AND I'VE CLEARED THE LANGUAGE  
18          WITH COUNSEL.

19          AND LET ME ASK YOU ALL, IN TERMS OF EVERYBODY'S  
20          ABILITY TO GET A FAIR TRIAL IN THIS CASE, DOES ANYBODY HAVE  
21          ANY OBJECTION TO THE PROPOSED STATEMENT THAT THE COURT  
22          INTENDS TO READ TO THE JURY AND WHICH HAD BEEN SHARED WITH  
23          YOU?

24               MR. FURR:     NO OBJECTION.

25               MR. HARDY:   NO OBJECTION.

26               MS. CHABER:   NO OBJECTION.

27               MR. ROSSE:    NO OBJECTION.

28               THE COURT:    THEN I'M GOING TO GO AHEAD AND DO

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1          THAT.

2               WE CAN GO OFF THE RECORD.

3               (RECESS TAKEN FROM 9:25 TO 9:35 A.M.)

4               THE COURT:    THE COURT JUST RECEIVED A NOTE FROM  
5          JUROR NO. 5, MS. HAZEL ANDERSON.

6               MS. CHABER:   HAZELLA.

7               THE COURT:    HAZELLA ANDERSON.

8               SHE SAYS:    "I'M SORRY FOR ANY INCONVENIENCE  
9               CAUSED TO THE COURT AND MY FELLOW JURORS. I'M  
10              NOT REALLY SURE IF I SHOULD STAY."

11              AND HAVING SHARED THIS NOTE WITH COUNSEL, I TAKE  
12              IT THAT YOU STIPULATE THAT I SHOULD CALL HER IN AND ASK HER  
13              WHETHER SHE CAN STILL BE A FAIR AND IMPARTIAL JUROR IN THIS

14 CASE?  
15 IS THAT SO STIPULATED BY EVERYBODY?  
16 MR. FURR: YES.  
17 MR. HARDY: YES.  
18 MS. CHABER: YES.  
19 MR. ROSSE: YES.  
20 THE COURT: I WILL DO THAT PURSUANT TO THE  
21 STIPULATION. I MIGHT MENTION THIS FOR THE RECORD. I TOLD  
22 THIS TO COUNSEL. MY CLERK TOLD ME, WHEN WE ALL WENT OUT  
23 YESTERDAY AFTERNOON FOR THE SIDEBAR, SHE SAID THE WORDS  
24 AUDIBLY, "SON OF A BITCH."  
25 WAS THAT THE EXPRESSION?  
26 THE CLERK: THAT WAS HER EXPRESSION.  
27 THE COURT: THAT WAS THE EXPRESSION.  
28 AND WHEN WE RETURNED TO THE COURTROOM, LET ME ASK  
4326  
1 COUNSEL IF YOU DIDN'T SHARE THE OBSERVATION THAT I HAD THAT  
2 SHE WAS SOMEWHAT TEARFUL?  
3 MS. CHABER: SHE TOOK TISSUES OUT. SHE WAS  
4 CRYING.  
5 THE COURT: UNLESS ANYBODY SAYS ANYTHING TO THE  
6 CONTRARY, THAT WAS MY OBSERVATION AS WELL. OKAY.  
7 ANY AND ALL COUNSEL WHO WISH TO BE HERE FOR THIS  
8 SESSION IN CHAMBERS WITH HER ARE WELCOME TO BE HERE, AND IF  
9 YOU CHOOSE TO HAVE FEWER PEOPLE HERE BECAUSE YOU THINK IT'S  
10 LESS INTIMIDATING, YOU ARE FREE TO DO THAT AS WELL.  
11 MS. CHABER: I THINK, SO ALL OF US HERE  
12 UNDERSTAND, COULD WE HAVE AN UNDERSTANDING WHAT THE COURT  
13 INTENDS TO SAY?  
14 THE COURT: I THINK WHAT I INTEND TO SAY IS  
15 THAT, "IN LIGHT OF YOUR NOTE, I NEED TO JUST ASK YOU ONE  
16 QUESTION. FIRST OF ALL, PLEASE DO NOT EXPRESS ANY OPINIONS  
17 OR VIEWS ABOUT THIS CASE. THE ADMONITION REMAINS IN EFFECT  
18 IN CHAMBERS. BUT AS A JUDGE OF THIS COURT, I HAVE A  
19 RESPONSIBILITY TO SEE THAT EVERYBODY IN THIS CASE GETS A  
20 FAIR AND IMPARTIAL TRIAL, AND I NEED TO KNOW FROM YOU  
21 WHETHER OR NOT THE EVENTS OF YESTERDAY ARE GOING TO PREVENT  
22 YOU FROM BEING A COMPLETELY FAIR AND IMPARTIAL JUROR IN THIS  
23 CASE OR IF YOU ARE COMFORTABLE THAT YOU REMAIN A FAIR  
24 IMPARTIAL JUROR IN THIS TRIAL."  
25 AND JUST ASK HER FOR HER ANSWER TO THAT  
26 QUESTION. THAT'S MY INTENT.  
27 DOES ANYBODY HAVE A PROBLEM WITH THAT?  
28 MR. HARDY: CERTAINLY NOT TO THE POINT OF  
4327  
1 OBJECTING. I MEAN, BUT I GUESS MY PREFERENCE WOULD BE THAT  
2 THE COURT ASK IT IN A PRESUMPTIVELY POSITIVE WAY; THAT IS,  
3 "IT IS MY EXPECTATION AND HOPE THAT YOU WILL, IN SPITE OF  
4 THESE EVENTS, BE ABLE TO ADHERE TO THE OATH YOU TOOK AND  
5 GIVE BOTH SIDES A FAIR AND IMPARTIAL TRIAL, BUT IF YOU'RE  
6 UNABLE TO DO THAT, THEN THIS IS THE TIME TO TELL US," OR  
7 SOMETHING OF THAT SORT.  
8 THE COURT: THAT'S FINE. LET ME MAKE A NOTE ON  
9 WHAT YOU SAID, BECAUSE THERE'S PERFECTLY FINE.  
10 "IT IS MY EXPECTATION THAT YOU WILL BE ABLE TO  
11 ADHERE TO YOUR OATH AS A JUROR AND THEREFORE CONTINUE TO BE  
12 A COMPLETELY FAIR AND IMPARTIAL JUROR. AND I JUST WANTED TO  
13 MAKE SURE THAT THAT IS THE CASE."  
14 MS. CHABER: I HAVE A PROBLEM WITH THAT.  
15 GIVEN HER REACTION YESTERDAY, JUDGE, THAT THE  
16 ONLY REASON THAT SHE WAS STAYING AND NOT WALKING OUT OF THIS  
17 COURTROOM WAS IN DEFERENCE AND RESPECT TO THE COURT, TO ME  
18 THAT SOUNDS LIKE THE COURT IS PLACING SOME UNDUE PRESSURE ON

19 HER TO NOT FULLY AND FREELY STATE WHAT IT IS THAT SHE  
20 CLEARLY HAS WRITTEN A NOTE THAT SHE WANTS TO BE ABLE TO  
21 EXPRESS.  
22 AND I WOULD REQUEST THAT THE COURT MAKE IT A  
23 LITTLE MORE OPEN-ENDED IN TERMS OF THE QUESTION THAT YOU  
24 ORIGINALLY STATED, ABOUT WHETHER SHE CAN BE FAIR, WITHOUT  
25 PUTTING THE PRESSURE ON HER THAT YOU EXPECT HER TO DO IT.  
26 THE COURT: WHY DON'T I JUST SAY: "FOR YOU TO  
27 REMAIN A JUROR IN THIS CASE, IT IS NECESSARY THAT YOU WILL  
28 BE ABLE TO ADHERE TO THE OATH THAT YOU TOOK AS A JUROR AND  
4328  
1 TO BE A COMPLETELY FAIR AND IMPARTIAL JUROR. I NEED TO KNOW  
2 IF THAT'S THE CASE."  
3 MR. HARDY: THAT'S FINE.  
4 MS. CHABER: THAT IS A LOT MORE NEUTRAL. I  
5 DON'T HAVE A PROBLEM WITH IT THAT WAY.  
6 THE COURT: OKAY. ALL RIGHT.  
7 MR. HARDY: THANK YOU.  
8 THE COURT: WE CAN GO OFF THE RECORD WHILE WE  
9 GET HER.  
10 (DISCUSSION OFF THE RECORD)  
11 (MS. ANDERSON ENTERS THE CHAMBERS AREA)  
12 THE CLERK: HAVE A SEAT.  
13 THE COURT: HI, MS. ANDERSON. COME ON IN. HAVE  
14 A SEAT.  
15 WE ARE ON THE RECORD IN CHAMBERS. AND I'M  
16 CALLING YOU IN BECAUSE OF THE NOTE THAT I RECEIVED FROM  
17 YOU.  
18 LET ME SAY AT THE OUTSET -- I'M GOING TO ASK YOU  
19 A QUESTION IN A MINUTE -- BUT YOU NEED TO KNOW THAT THE  
20 ADMONITION REMAINS IN EFFECT. SO PLEASE DO NOT EXPRESS ANY  
21 OPINIONS OR VIEWS ABOUT THE CASE OR TALK AT ALL ABOUT THE  
22 SUBSTANCE OF THIS CASE.  
23 THE REASON I'M CALLING YOU IN, AS YOU KNOW, IT'S  
24 MY JOB AS THE JUDGE TO BE SURE THAT EVERYBODY IN THIS AND  
25 ANY OTHER CASE GETS A FAIR AND IMPARTIAL JURY, SO THEY GET A  
26 FAIR TRIAL. IT'S FUNDAMENTAL IN OUR SYSTEM OF JUSTICE FOR  
27 YOU TO REMAIN AS A JUROR IN THIS CASE. AND YOU EXPRESSED  
28 SOME QUESTIONS ABOUT THAT.  
4329  
1 IT WILL BE NECESSARY FOR YOU TO BE ABLE TO ADHERE  
2 TO THE OATH THAT YOU GAVE IN THIS CASE TO BE A COMPLETELY  
3 FAIR AND IMPARTIAL JUROR.  
4 AND I NEED TO KNOW IF THAT IS THE SITUATION?  
5 JUROR NO. 5: I'M NOT SURE, JUDGE. REALLY, I AM  
6 NOT SURE. I GOT VERY UPSET YESTERDAY AND THAT IS NOT PART  
7 OF ME. I --  
8 THE COURT: YOU RECOGNIZE THAT, AS A JUROR, ALL  
9 THE PARTIES IN THE CASE ARE ENTITLED TO, YOU KNOW, A FAIR  
10 TRIAL, WHICH MEANS --  
11 JUROR NO. 5: OF COURSE.  
12 THE COURT: -- A FAIR AND UNBIASED AND  
13 UNPREJUDICED JURY.  
14 AND DO YOU THINK YOU WOULD BE ABLE TO SET ASIDE  
15 WHATEVER UPSET YOU YESTERDAY AND VIEW THIS CASE FAIRLY AND  
16 IMPARTIALLY AS A JUROR?  
17 JUROR NO. 5: THAT'S OVER WITH NOW, WHAT  
18 HAPPENED YESTERDAY, YOU KNOW.  
19 THE COURT: CAN YOU PUT THAT BEHIND YOU THEN AND  
20 WOULD THAT -- IF YOU CAN PUT THAT BEHIND YOU, WOULD THAT  
21 ENABLE YOU TO BE A FAIR AND IMPARTIAL JUROR SUCH THAT WE CAN  
22 HOLD ON TO YOU?  
23 JUROR NO. 5: YES, I CAN.

24 THE COURT: OKAY. SO YOU WILL BE FAIR AND  
25 IMPARTIAL, AND WHATEVER HAPPENED YESTERDAY THAT UPSET YOU,  
26 YOU ARE CONFIDENT THAT YOU WILL BE ABLE TO PUT THAT OUT OF  
27 YOUR MIND?

28 JUROR NO. 5: YES.

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1 THE COURT: AND RESPECT AND HONOR THE OATH THAT  
2 YOU GAVE AT THE OUTSET OF THIS CASE?

3 JUROR NO. 5: YES, BECAUSE THE OATH DOES MEAN  
4 SOMETHING TO ME.

5 THE COURT: I REALLY WANT TO TELL YOU, I REALLY  
6 APPRECIATE YOUR DOING THAT. AND I LOVE TO SEE CITIZENS OF  
7 THIS COMMUNITY RESPOND IN THE WAY THAT YOU DO.

8 SOMETHING UPSETS YOU. YOU RECOGNIZE THAT THE  
9 OVERRIDING CONSIDERATION IS THE OATH THAT YOU TOOK, WHICH IS  
10 TO BE FAIR AND IMPARTIAL. AND SO IF SOMETHING HAPPENS  
11 THAT'S UPSETTING TO YOU ONE DAY, YOU ARE GOING TO PUT IT  
12 ASIDE, BE FAIR AND IMPARTIAL, GIVE EVERYBODY A FAIR TRIAL  
13 HERE?

14 JUROR NO. 5: YES.

15 THE COURT: I'M NOT PUTTING WORDS IN YOUR  
16 MOUTH?

17 JUROR NO. 5: NO, YOU'RE NOT, JUDGE.

18 THE COURT: THANK YOU. WE ARE GOING TO HOLD ON  
19 TO YOU.

20 THANK YOU VERY MUCH.

21 JUROR NO. 5: THANK YOU FOR TALKING WITH ME.

22 THE COURT: THANK YOU.

23 JUROR NO. 5: OKAY.

24 (MS. ANDERSON LEFT THE CHAMBERS AREA)

25 (DISCUSSION OFF THE RECORD).

26 THE COURT: WE ARE BACK ON THE RECORD FOR  
27 PURPOSES OF REVIEWING THE COURT'S CONVERSATION WITH MS.  
28 ANDERSON.

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1 WOULD ANYBODY LIKE TO EXPRESS ANY VIEWS ON THAT?

2 MS. CHABER: I WOULD. I AM STILL CONCERNED.

3 MS. ANDERSON HAD TEARS IN HER EYES THROUGH THE  
4 COURSE OF THE COURT'S QUESTIONING HER. I THINK THAT SHE --  
5 GIVEN THE WAY SHE EXPRESSED HERSELF YESTERDAY, THAT IT WAS  
6 IN DEFERENCE TO THE JUDGE AND IN RESPECT FOR THE JUDGE THAT  
7 SHE WAS GOING TO STAY AND LISTEN TO THE TESTIMONY, AND SHE  
8 THEN STAYED AND CRIED THROUGHOUT THE TESTIMONY AND VERY  
9 VISIBLY WAS UPSET, THAT SHE AT LEAST APPEARED TO ME TO STILL  
10 BE UPSET, PARTICULARLY WITH THE TEARS THAT WERE WELLING UP  
11 IN HER EYES.

12 AND I AM CONCERNED THAT SHE IS STAYING OUT OF AN  
13 ABUNDANCE OF RESPECT FOR THE COURT AND RESPECT FOR THE  
14 PROCESS, BUT NONETHELESS, THAT THIS IS SOMETHING THAT WAS  
15 VERY UPSETTING TO HER ON A VERY PERSONALIZED LEVEL AND THAT  
16 IT WILL OR HAS THE POTENTIAL TO IMPACT MY CLIENTS, SINCE IT  
17 WAS MY PARTNER WHO MADE THE GUFFAW THAT LED TO ALL OF THIS,  
18 WHICH I THINK THERE IS NO WAY OF CLEARING UP WITH HER.

19 AND I AM CONCERNED THAT IT WILL BE HELD AGAINST  
20 MY CLIENTS.

21 MR. HARDY: ON BEHALF OF PHILIP MORRIS, I THINK  
22 THAT IT'S THE APPROPRIATE THING TO DO TO RETAIN THE JUROR.  
23 I THOUGHT THAT THE TELLING POINTS WERE HER STATEMENT ON THE  
24 RECORD IN THE EARLY PART OF THE SESSION WHERE SHE STATED  
25 THAT YESTERDAY'S EVENTS WERE BEHIND HER.

26 AND SUBSEQUENTLY, WHEN SHE ASSURED THE COURT  
27 IN INDICATING THAT -- IN SECURING FROM HER AN AFFIRMATIVE  
28 RESPONSE THAT SHE COULD BE A FAIR AND IMPARTIAL JUROR AND

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1 ADHERE TO THE OATH, SHE ASSURED THE COURT SHE WAS NOT HAVING  
2 WORDS PUT IN HER MOUTH, THAT SHE COULD DO IT.

3 AND I THINK IT'S APPROPRIATE TO KEEP HER.

4 MR. FURR: I WOULD ONLY ADD THAT MS. ANDERSON  
5 VOLUNTEERED THE IMPORTANCE OF THE OATH TO HER, AND IT'S  
6 CONSISTENT WITH OUR OBSERVATION THROUGHOUT THE TRIAL AS TO  
7 HOW ATTENTIVE AND FOCUSED A JUROR SHE'S BEEN.

8 THE COURT: YOU WANT ME TO HOLD ON TO HER?

9 MR. FURR: YES, WE DO.

10 MR. ROSSE: I WANT TO HOLD ON TO HER.

11 THE COURT: THE COURT IS GOING TO HOLD ON TO  
12 HER. THE COURT IS IMPRESSED BY HER SINCERITY AND TOTALLY  
13 BELIEVES HER WHEN SHE SAYS THAT SHE WILL BE A FAIR AND  
14 IMPARTIAL JUROR. SHE VOLUNTEERED THE INFORMATION THAT  
15 YESTERDAY'S UPSET WAS BEHIND HER.

16 AND WITH RESPECT TO MS. CHABER'S COMMENT THAT  
17 THIS IS A PERSON THAT HAS A LOT OF RESPECT FOR THE COURT AND  
18 THE PROCESS, MY OBSERVATION IS THAT THAT'S ALL A GOOD THING  
19 AND IT'S PART OF WHAT MAKES PEOPLE GOOD JURORS.

20 AND THE COURT IS SATISFIED THAT SHE DOES HAVE A  
21 RESPECT FOR THE COURT AND A RESPECT FOR THE PROCESS AND THAT  
22 SHE HAS A RESPECT FOR THE OATH THAT SHE TOOK AND WILL HONOR  
23 IT.

24 AND SO THE COURT'S IMPRESSION OF HER IN TERMS OF  
25 BODY LANGUAGE IS THAT SHE EXUDES SINCERITY AND THE COURT IS  
26 SATISFIED, WHEN SHE SAYS SOMETHING, SHE WILL DO IT. SO I'M  
27 GOING TO LEAVE HER ON.

28 OKAY. WE CAN GO OFF THE RECORD.

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1 (THE FOLLOWING PROCEEDINGS WERE HELD IN THE  
2 COURTROOM, IN THE PRESENCE OF THE JURY,  
3 AT 10:05 A.M.)

4 THE COURT: GOOD MORNING.

5 LET ME TAKE CARE OF A COUPLE OF HOUSEKEEPING  
6 MATTERS OR MATTERS UNRELATED TO THE TESTIMONY, FOR STARTERS.

7 FIRST OF ALL, I TOLD YOU THAT I WOULD GIVE YOU AN  
8 ESTIMATE AS TO WHEN I THINK THIS CASE WILL BE GETTING INTO  
9 YOUR HANDS.

10 SO I TALKED TO THE LAWYERS ABOUT THAT, AND HERE'S  
11 THE BEST ESTIMATE. I THINK THAT THE CASE WILL BE GOING INTO  
12 YOUR HANDS FOR YOU TO START YOUR DELIBERATIONS THE WEEK  
13 AFTER NEXT. I THINK IT'S LIKELY TO BE MID TO LATE WEEK, BUT  
14 I CAN'T BE TOO PRECISE ON THIS. YOU CAN'T TAKE WHAT I'M NOW  
15 TELLING YOU TO THE BANK WITH YOU. IT'S EVERYBODY'S BEST  
16 ESTIMATE. BUT I AM COMFORTABLE THAT THE CASE WILL GET INTO  
17 YOUR HANDS SOMETIME DURING THAT WEEK. AND THEN, OF COURSE,  
18 HOW LONG IT TAKES WILL BE A MATTER UP TO YOU.

19 SO I CAN'T DO MORE THAN THAT. THAT'S THE BEST  
20 ESTIMATE. AND I THINK THAT COMES WITHIN THE TIME ESTIMATE  
21 THAT I GAVE YOU AT THE OUTSET OF THE CASE.

22 ANOTHER HOUSEKEEPING MATTER IS -- AND I DON'T  
23 KNOW WHETHER THIS WILL CAUSE ANY INTERRUPTIONS OR NOT --  
24 LET ME JUST TELL YOU, THIS AFTERNOON, OUR PRESIDING JUDGE IS  
25 GOING TO BE AWAY AND I'M THE DESIGNATED PRESIDING JUDGE FOR  
26 THE COURT FOR THIS AFTERNOON.

27 ON FRIDAY AFTERNOONS, THAT USUALLY DOES NOT  
28 INVOLVE VERY MUCH, AND IT MAY BE NO WORK, BUT I DO HAVE TO

4334

1 BE ON CALL IN CASE SOME COURT BUSINESS ARISES. BUT IF IT  
2 DOES, IT WON'T TAKE VERY LONG.

3 I JUST TELL YOU THAT, BECAUSE IT'S A  
4 POSSIBILITY. I DON'T THINK THAT IT WILL HAPPEN. IF IT



5 DOES, I DON'T THINK IT WILL TAKE VERY MUCH TIME, BUT IT  
6 MIGHT.

7 NOW, ONE MORE MATTER BEFORE WE GET TO THE NEXT  
8 WITNESS. ONE OF THE JURORS HAS ASKED WHETHER IT IS  
9 PERMITTED FOR A JUROR TO READ OR LISTEN TO ARGUMENTS FOR AND  
10 AGAINST PROPOSITION 28, WHICH IS ON NEXT MONTH'S BALLOT.  
11 THAT IS A VERY GOOD QUESTION.

12 IN ANSWERING IT, THE COURT MUST EVALUATE A  
13 CONFLICT BETWEEN TWO VERY IMPORTANT CONSIDERATIONS. ONE OF  
14 THEM IS THE RIGHT OF ALL PARTIES IN THIS CASE TO GET A FAIR  
15 TRIAL; THAT IS, A TRIAL WHICH IS NOT IN ANY WAY AFFECTED OR  
16 INFLUENCED BY ANY INFORMATION OBTAINED OUTSIDE THE  
17 COURTROOM.

18 THE ARGUMENTS WHICH RELATE TO PROP. 28 NOT ONLY  
19 ARE INFORMATION OBTAINED OUTSIDE OF THE COURTROOM BUT ALSO  
20 WILL NECESSARILY INVOLVE THE SUBJECT OF TOBACCO AND TOBACCO  
21 COMPANIES. THEREFORE, SUCH ARGUMENTS ARE NOT A PROPER  
22 SUBJECT OF JUROR REVIEW DURING THIS TRIAL.

23 THE COMPETING CONSIDERATION IS THE RIGHT OF ALL  
24 CITIZENS, INCLUDING JURORS, TO VOTE AND TO DO SO ON AN  
25 INFORMED BASIS. IT FOLLOWS THAT THE COURT MUST BALANCE  
26 THESE FACTORS. IN DOING SO, THE COURT HAS A RESPONSIBILITY  
27 TO AND MUST ASSURE THAT THIS IS A FAIR TRIAL.

28 THEREFORE, THE COURT MUST DIRECT YOU AND DOES  
4335

1 DIRECT YOU TO AVOID READING ANY INFORMATION ABOUT PROP. 28  
2 DURING THE COURSE OF THIS TRIAL, INCLUDING DURING THE COURSE  
3 OF YOUR DELIBERATIONS.

4 THE COURT RECOGNIZES THAT THIS DIRECTION MAY WELL  
5 IMPOSE A HARDSHIP ON SOME OF YOU. HOWEVER, THE COURT HOPES  
6 THAT YOU WILL RECOGNIZE THE IMPORTANCE OF YOUR OATH AND  
7 RESPONSIBILITY AS JURORS IN THIS CASE AND THAT YOU WILL NOT  
8 VIEW THIS DIRECTION AS AN IMPOSITION.

9 IF IN THE MEANWHILE ANY OF YOU HAVE ALREADY READ  
10 OR HEARD ARGUMENTS ABOUT PROP. 28, YOU MUST DISREGARD ANY  
11 AND ALL SUCH INFORMATION IN EVALUATING THE EVIDENCE IN THIS  
12 CASE AND IN REACHING YOUR VERDICT.

13 AS YOU KNOW, YOU MUST BASE YOUR VERDICT SOLELY  
14 UPON THE ADMISSIBLE EVIDENCE PRESENTED HERE IN COURT AND THE  
15 APPLICATION OF THE LAW AS I GIVE IT TO YOU AND YOUR COMMON  
16 SENSE TO THAT ADMISSIBLE EVIDENCE.

17 IN SHORT, YOU MUST NOT CONSIDER ANY INFORMATION  
18 WHICH YOU MAY HAVE PREVIOUSLY READ OR HEARD IN CONNECTION  
19 WITH PROP. 28 FOR ANY PURPOSE IN THIS CASE.

20 SO I HOPE THAT THAT'S AN ANSWER TO YOUR  
21 QUESTION.

22 OKAY. I THINK WE ARE READY FOR OUR NEXT  
23 WITNESS. AND THE QUESTIONS ARE: WHO IS CALLING THE NEXT  
24 WITNESS AND WHO WILL THE NEXT WITNESS BE?

25 MR. ESCHER: YOUR HONOR, THE NEXT WITNESS WILL  
26 BE DR. CLAUDE MARTIN. BEFORE THAT, WE HAVE SOME EVIDENTIARY  
27 ISSUES LEFT OVER FROM YESTERDAY THAT MR. BARRON WOULD LIKE  
28 TO DEAL WITH.

4336

1 THE COURT: OKAY.

2 MR. BARRON: YES, YOUR HONOR. WE WOULD LIKE TO  
3 MOVE INTO EVIDENCE THE MEDICAL RECORD EXHIBITS, NOS.  
4 5922.08A, 5922.03A, 5922.03B, 5922.02D, D AS IN DELTA,  
5 5922.11 B, 5922.11C.

6 THE COURT: ANY OBJECTION?

7 MS. CHABER: YES, YOUR HONOR.

8 WE OBJECT UNDER EVIDENCE CODE SECTION 1101 AND  
9 352, AS DISCUSSED OFF THE RECORD YESTERDAY.

10 THE COURT: OKAY.  
11 AND THE COURT OVERRULES THOSE OBJECTIONS. AND  
12 THE COURT HAS DONE THE 352 BALANCING, AND HAVING DONE SO  
13 OVERRULES THE OBJECTIONS.  
14 SO EACH OF THOSE IS RECEIVED. LET ME JUST REPEAT  
15 IT SO I HAVE IT RIGHT AND THE RECORD IS CORRECT: 5922.08A,  
16 5922.03A, 5922.03B, 5922.02D, 5922.11B AND 5922.11C.  
17 RIGHT?  
18 MR. BARRON: THAT IS CORRECT, YOUR HONOR.  
19 THE COURT: THEY'RE ALL RECEIVED.  
20 (DOCUMENTS MORE PARTICULARLY  
21 LISTED IN THE INDEX RECEIVED  
22 IN EVIDENCE AS DEFENDANTS'  
23 EXHIBITS # 5922.08A, 5922.03A,  
24 5922.03B, 5922.02D, 5922.11B  
25 AND 5922.11C)  
26 THE COURT: WHAT'S NEXT?  
27 MR. ESCHER: WE'D LIKE TO CALL DR. CLAUDE MARTIN  
28 TO THE STAND, YOUR HONOR.

4337

1 THE COURT: OKAY.  
2 THE CLERK: PLEASE COME FORWARD. IF YOU COULD  
3 STEP ON AROUND AND REMAIN STANDING, PLEASE.  
4 PLEASE RAISE YOUR RIGHT HAND.  
5 TESTIMONY OF  
6 CLAUDE MARTIN, PH.D.,  
7 A WITNESS CALLED ON BEHALF OF THE DEFENSE, HAVING BEEN DULY  
8 SWORN, TESTIFIED AS FOLLOWS:  
9 THE CLERK: PLEASE STATE YOUR NAME FOR THE  
10 RECORD.  
11 THE WITNESS: CLAUDE MARTIN.  
12 THE CLERK: CLAUDE, C-L-A-U-D-E?  
13 THE WITNESS: C-L-A-U-D-E.  
14 THE CLERK: AND YOUR LAST NAME, PLEASE?  
15 THE WITNESS: M-A-R-T-I-N.  
16 THE CLERK: THANK YOU. PLEASE BE SEATED.

17  
18 DIRECT EXAMINATION  
19 BY MR. ESCHER: Q. GOOD MORNING, DR. MARTIN.  
20 A. GOOD MORNING.  
21 Q. DR. MARTIN, COULD YOU TELL US A LITTLE BIT ABOUT  
22 YOURSELF. WHAT DO YOU DO FOR A LIVING?  
23 A. I'M A PROFESSOR OF MARKETING AT THE UNIVERSITY OF  
24 MICHIGAN'S BUSINESS SCHOOL.  
25 Q. AND WHAT SUBJECTS ARE YOU GOING TO DISCUSS WITH  
26 US TODAY, DOCTOR?  
27 A. I'M GOING TO BE DISCUSSING SUBJECTS THAT RELATE  
28 TO CONSUMER BEHAVIOR, SMOKING INITIATION, THE ROLE OF

4338

1 ADVERTISING IN SMOKING BEHAVIOR AND THE ROLE OF MARKETING IN  
2 THAT BEHAVIOR.  
3 Q. AND DR. MARTIN, YOU ARE A PH.D., NOT A MEDICAL  
4 DOCTOR; IS THAT RIGHT?  
5 A. THAT'S CORRECT.  
6 Q. OKAY.  
7 A. MY WIFE CALLS IT A PAPER DOCTOR.  
8 Q. WE HAVE HAD A LOT OF PAPER DOCTORS AND MEDICAL  
9 DOCTORS IN THIS CASE.  
10 WHERE DO YOU LIVE, DOCTOR?  
11 A. I LIVE IN [DELETED].  
12 Q. ARE YOU MARRIED?  
13 A. OH, YES.  
14 Q. AND HOW MANY CHILDREN -- DO YOU HAVE ANY

15 CHILDREN?  
16 A. YES.  
17 Q. HOW MANY?  
18 A. SIX.  
19 Q. AND HOW MANY GRANDCHILDREN?  
20 A. SEVEN.  
21 Q. AND HOW OLD IS YOUR OLDEST CHILD?  
22 A. LET ME SEE NOW. I'VE GOT TO REMEMBER WHEN I GOT  
23 MARRIED.  
24 THAT'S THE WAY I TRACE IT. SHE IS 41 PLUS THIS  
25 YEAR.  
26 Q. DOCTOR, COULD YOU DESCRIBE FOR US YOUR  
27 EDUCATIONAL BACKGROUND, THE DEGREES YOU HAVE EARNED AND  
28 WHERE YOU RECEIVED THEM.  
4339  
1 A. YES. I HAVE A BACHELOR'S OF SCIENCE DEGREE FROM  
2 THE UNIVERSITY OF SCRANTON IN PENNSYLVANIA. I ALSO HAVE A  
3 MASTER OF BUSINESS ADMINISTRATION FROM THAT SAME  
4 UNIVERSITY.  
5 AND I HAVE MY PH.D. FROM COLUMBIA UNIVERSITY IN  
6 NEW YORK.  
7 Q. AND WHEN DID YOU RECEIVE YOUR PH.D.?  
8 A. IN 1969.  
9 Q. AND HOW LONG HAVE YOU BEEN TEACHING AT THE  
10 COLLEGE OR GRADUATE SCHOOL LEVEL IN THE AREA OF MARKETING?  
11 A. ACTUALLY TEACHING, FROM 1964 FORWARD.  
12 Q. AND ARE YOU STILL TEACHING?  
13 A. OH, YES.  
14 Q. AND THAT'S AT THE UNIVERSITY OF MICHIGAN?  
15 A. THAT'S CORRECT.  
16 Q. SO YOU HAVE BEEN TEACHING FOR, WHAT, MORE THAN 35  
17 YEARS NOW?  
18 A. YES.  
19 Q. AND YOU WERE TEACHING IN THE AREA OF MARKETING  
20 DURING THAT ENTIRE TIME PERIOD?  
21 A. YES, I HAVE BEEN.  
22 Q. NOW, WHAT AREAS DID YOU STUDY TO EARN A PH.D. IN  
23 BUSINESS ADMINISTRATION?  
24 A. THERE ARE A LOT OF DIFFERENT ONES, BUT THEY WERE  
25 THE CLASSIC COURSES IN BUSINESS ADMINISTRATION, LIKE  
26 STATISTICS, ACCOUNTING, FINANCE. THERE WAS A THING  
27 CALLED -- WHICH IS, BY THE WAY, MY KIND OF SECOND MAJOR --  
28 WHICH IS CALLED ORGANIZATION OR OPERATIONS MANAGEMENT.  
4340  
1 I ALSO STUDIED SOME COURSES THAT DEALT WITH THE  
2 HISTORY OF BUSINESS.  
3 BUT THEN THE MAJOR COURSES THAT I UNDERTOOK IN  
4 MARKETING WERE MARKETING, MARKETING RESEARCH. AND, OF  
5 COURSE, I HAD A LOT OF THOSE, THE UNDERPINNING IN MARKETING  
6 FROM MY MBA PROGRAM.  
7 AND ON TOP OF ALL OF THAT, SPECIFICALLY IN  
8 MARKETING, I MAJORED IN THE AREA OF CONSUMER BEHAVIOR.  
9 Q. NOW, WHAT IS "CONSUMER BEHAVIOR," THE WAY YOU ARE  
10 USING THAT TERM?  
11 A. WELL, IT IS THE ATTEMPT FOR US TO TRY TO  
12 UNDERSTAND THE PROCESS IN HOW PEOPLE REACH BUYING DECISIONS.  
13 Q. IS THIS A RELATIVELY NEW AREA OF ACADEMIC  
14 INQUIRY?  
15 A. WELL, IT IS AND IT ISN'T.  
16 ACTUALLY, IT'S AN OLD ACADEMIC AREA, BECAUSE FOR  
17 A LONG PERIOD OF TIME, IT WAS FOUNDED KIND OF IN THE  
18 DISCIPLINE OF ECONOMICS. AND MUCH OF IT WAS RELATED TO WHAT  
19 WAS THE EFFECT OF PRICE ON PEOPLE'S DECISION-MAKING.

20 BUT WE BEGAN TO FIND THAT THAT WAS SOMEWHAT  
21 INADEQUATE. AND SO IN THE -- OH, I WOULD SAY THE LATE  
22 1950S, WE BEGAN TO LOOK AROUND FOR OTHER AREAS THAT MIGHT  
23 PROVIDE US WITH SOME INSIGHT INTO HOW PEOPLE -- AND PEOPLE  
24 NOT ONLY AS CONSUMERS BUT PEOPLE IN ORGANIZATIONS -- WOULD  
25 MAKE PURCHASING DECISIONS.

26 WE DID LOOK AT SOME THINGS THAT CAME OUT OF WHAT  
27 I WOULD CALL POP PSYCHOLOGY. WE HAVE THE HIDDEN  
28 PERSUADERS. SOME PEOPLE MAY STILL REMEMBER THAT. AND WE  
4341

1 HAD SUBLIMINAL ADVERTISING. BUT THEY QUICKLY WENT AWAY,  
2 BECAUSE WE FOUND THAT THEY REALLY WERE NOT ADEQUATE AS  
3 DESCRIPTORS OF THE PROCESS THAT PEOPLE GO THROUGH.

4 AND SO IN THE 19 -- EARLY 1960S, THE DISCIPLINE  
5 MOVED TO KIND OF BORROWING, IF YOU WANT, FROM OTHER  
6 DISCIPLINES, PSYCHOLOGY, SOCIOLOGY. WE EVEN BORROWED FROM  
7 PHYSICAL SCIENCES IN AN ATTEMPT TO TRY AND UNDERSTAND HOW  
8 THIS DECISION-MAKING TAKES PLACE.

9 Q. SO DO YOU CONSIDER THE STUDY OF CONSUMER BEHAVIOR  
10 TO BE A SOCIAL SCIENCE?

11 A. YES, I DO.

12 Q. AND DO YOU ENDEAVOR TO USE SCIENTIFIC TECHNIQUES  
13 TO UNDERSTAND CONSUMER BEHAVIOR?

14 A. YES, WE CERTAINLY DO THAT.

15 Q. THAT WOULD INCLUDE EMPIRICAL DATA?

16 A. OH, YES. VERY MUCH SO.

17 Q. MAYBE IF YOU COULD DESCRIBE FOR US A LITTLE BIT  
18 WHAT YOU MEAN BY THE TERM "MARKETING."

19 A. WELL, I MEAN, I COULD COME HERE AND PROBABLY BORE  
20 EVERYBODY IN THE ROOM WITH THE OFFICIAL DEFINITION, WHICH BY  
21 THE WAY CHANGES ALMOST CONSISTENTLY OVER TIME, FROM THE  
22 AMERICAN MARKETING ASSOCIATION. QUITE FRANKLY, I GET BORED  
23 BY IT TOO.

24 WHEN I TEACH MARKETING, MY DEFINITION TO  
25 STUDENTS, AND INCLUDING EXECUTIVES, IS THAT IT'S LIKE AN OLD  
26 CONCEPT THAT SOME OF US MIGHT REMEMBER, WHICH HAS GONE  
27 COMPLETELY OUT OF FASHION, BUT IT'S LIKE THE MARRIAGE  
28 BROKER.  
4342

1 AND THAT IS, THAT YOU HAVE SOMEBODY WHO BRINGS  
2 TWO PARTIES TOGETHER. AND IN THIS CASE, IT'S THE CONSUMER  
3 OR THE CUSTOMER IS BROUGHT TOGETHER HERE, (INDICATING) WHO  
4 HAS NEEDS AND WANTS AND THINGS OF THAT SORT. AND OVER HERE  
5 IS THE PROVIDER OF GOODS AND SERVICES, WE'LL CALL THEM THE  
6 MARKETER.

7 AND THE MARKETING PEOPLE TRY TO BRING THESE TWO  
8 TOGETHER IN A HARMONIOUS WAY, SO THAT THE CONSUMER GETS THE  
9 VALUE THAT THEY WANT OUT OF THE EXCHANGE AND THE PROVIDER  
10 GETS THE VALUE THEY WANT OUT OF THE EXCHANGE.

11 SO IT'S KIND OF LIKE A BROKER OR ARRANGING A  
12 RELATIONSHIP BETWEEN CONSUMERS AND PROVIDERS.

13 Q. IS THERE AN EASY TO REMEMBER METHODOLOGY THAT YOU  
14 TEACH TO YOUR STUDENTS ABOUT MARKETING?

15 A. THAT'S PRETTY MUCH THE WAY IN WHICH WE GET INTO  
16 THAT. MANY OF THEM, YOU KNOW, THEY KIND OF JUMP BACK AND  
17 SAY "MARRIAGE BROKER"? THEY KIND OF NEVER HEARD OF THAT.

18 BUT THEY UNDERSTAND THE IDEA OF BROKER AND THEY  
19 UNDERSTAND THE IDEA THAT IT'S VERY MUCH AS I TEND TO THINK  
20 OF IT, LIKE PEOPLE IN A MARRIAGE.

21 Q. AND IN YOUR INTRODUCTORY CLASSES ON MARKETING, DO  
22 YOU TEACH SOMETHING YOU CALL THE FOUR P'S?

23 A. OH, YES.

24 Q. WHAT ARE THE FOUR P'S?

25 A. THE FOUR P'S -- BY THE WAY, THE REASON THEY'RE  
26 CALLED P'S, I SOMETIMES THINK THAT SOMEBODY HAD A HARD TIME  
27 REMEMBERING WHAT EVERYTHING WAS, SO THEY USED THE WORDS  
28 "FOUR P'S."

4343

1 I'LL TRY AND EXPLAIN THAT. THE FOUR P'S ARE,  
2 ONE, PRODUCT. SO IT IS THE PHYSICAL GOOD OR THE SERVICE  
3 THAT WE BRING TO THE EXCHANGE BETWEEN US AND THE CONSUMER.  
4 AND ALL OF THE THINGS THAT ARE INVOLVED IN THE PRODUCT,  
5 INCLUDING THE PACKAGING AND ALL OF THAT.

6 AND THEN THERE IS THE PRICE. AND IT'S NOT JUST  
7 THE PRICE, BUT IT'S THE PRICE AND HOW THE PRICE IS SET AND  
8 HOW THE PRICE IS DESCRIBED AND WHAT KIND OF DIFFERENCES WE  
9 MAKE OF THE PRICE.

10 AND NOW WE COME TO THE TWO THAT DISTURB ME WHEN  
11 WE CALL THEM P'S, BECAUSE ONE OF THOSE IS PROMOTION.

12 AND WITHIN MARKETING, THERE IS A THING CALLED  
13 SALES PROMOTION. AND PROMOTION IS ONE OF THE ELEMENTS OF  
14 WHAT I WOULD CALL THE MARKETING COMMUNICATIONS. SO I WOULD  
15 PREFER THAT WE HAVE NOW TWO P'S AND A C, AND THAT WOULD BE  
16 MARKETING COMMUNICATIONS.

17 NOW, THE FOURTH ONE IS THE ONE I'M ALSO HAVING  
18 SOME PROBLEMS WITH, BECAUSE IT'S KNOWN AS PLACE. IF WE  
19 THINK OF PLACE, THEN WE START THINKING OF LIKE THE RETAIL  
20 STORE, BUT IT'S MUCH MORE THAN THAT. IT'S THE WHOLE  
21 DELIVERY SYSTEM FOR THE GOODS AND SERVICES TO THE ULTIMATE  
22 CUSTOMER.

23 SO IT'S THINGS LIKE THE WHOLESALER, IT'S THE  
24 INVENTORY AND GOODS, IT'S THE WAREHOUSING, IT'S THE ACTUAL  
25 MOVEMENT OF EITHER THE PHYSICAL GOOD OR THE SERVICE,  
26 INCLUDING THE FINANCIAL PART OF IT, FROM US DOWN TO THE  
27 CUSTOMER.

28 SO WHAT I END UP WITH -- WE CALL THAT CHANNELS.

4344

1 SO WHAT I REALLY END UP WITH KIND OF -- AND MY COLLEAGUES  
2 HAVE A PROBLEM WITH IT -- WE HAVE TWO P'S AND TWO C'S.

3 Q. TWO P'S AND TWO C'S. I GUESS IT DEPENDS ON WHO  
4 YOU ASK.

5 DO YOU USE A TERM "MARKETING MIX" IN YOUR LINE OF  
6 WORK?

7 A. YES. THAT IS THE MARKETING MIX.

8 AND THE IMPORTANT PART OF THIS IS THAT THE  
9 TENDENCY IS TO SAY, "WELL, I WILL JUST CONCENTRATE ON THE  
10 PRODUCT" OR "I WILL JUST CONCENTRATE ON THE PRICE."

11 WHAT WE ARE TRYING TO DO, AS PEOPLE IN BUSINESS,  
12 IS TO HAVE THE OPTIMUM BLEND, IF YOU WANT, OR MIXTURE OF  
13 THOSE ELEMENTS OF PRODUCT, PLACE, PRICE AND PROMOTION.

14 BUT ALSO, ONE OF THE THINGS WE ARE TRYING DO, WE  
15 HAVE KIND OF SUBBLEND UNDERNEATH THOSE. SO, FOR INSTANCE,  
16 IN MARKETING COMMUNICATIONS, WE HAVE ADVERTISING, WE HAVE  
17 THE PERSONAL SALES MESSAGE. WE MIGHT HAVE PUBLIC  
18 RELATIONS. SO THAT'S KNOWN AS THE KIND OF THE  
19 COMMUNICATIONS MIX.

20 SO THERE'S A LOT OF BLENDING AND MIXING. THAT'S  
21 WHERE THE WORD "MARKETING MIX" COMES INTO PLAY.

22 Q. AFTER YOU OBTAINED YOUR PH.D. FROM COLUMBIA  
23 UNIVERSITY IN 1969, WHAT DID YOU DO?

24 A. WELL, I WAS FORTUNATE. I WAS ALREADY GAINFULLY  
25 EMPLOYED, BECAUSE I HAD COME TO THE UNIVERSITY OF MICHIGAN  
26 IN 1965 AND SERVED AS A LECTURER, NOT IN THE TENURE TRACK,  
27 BUT AS LECTURER FOR FOUR YEARS, WHILE I FINISHED MY PH.D.  
28 THESIS AND SOME QUALIFYING EXAMINATIONS THAT I NEEDED TO

4345

1 ATTEND TO.  
2 THEN, IN 1969, I WAS STILL AT MICHIGAN, AND  
3 STAYED THERE. AND I WAS PUT INTO THE TENURE TRACK AS  
4 ASSISTANT PROFESSOR.  
5 Q. COULD YOU TELL US A LITTLE BIT ABOUT THE  
6 UNIVERSITY OF MICHIGAN AS AN INSTITUTION.  
7 IS IT A LARGE SCHOOL?  
8 A. A VERY LARGE SCHOOL. IT'S A -- IT'S NOT A STATE  
9 SCHOOL, BUT IT'S A PUBLIC SCHOOL, AND SOMETIMES TRIES TO ACT  
10 LIKE IT'S A PRIVATE SCHOOL. PEOPLE GET ANNOYED AT THAT.  
11 AND IT IS A SINGLE UNIVERSITY. IN THE STATE OF  
12 MICHIGAN, UNLIKE THE STATE OF CALIFORNIA, THERE IS ONLY ONE  
13 UNIVERSITY OF MICHIGAN.  
14 NOW, THERE ARE TWO OTHER CAMPUSES, ONE IN  
15 DEARBORN AND ONE IN FLINT, BUT THE THREE OPERATE COMPLETELY  
16 INDEPENDENTLY, UNLIKE THE UNIVERSITY OF CALIFORNIA SYSTEM  
17 WHERE YOU HAVE DIFFERENT CAMPUSES OF THE UNIVERSITY OF  
18 CALIFORNIA, FOR INSTANCE BERKELEY AND UCLA. SO IT IS  
19 INDEPENDENT IN THAT SENSE.  
20 SO THERE ARE OTHER PUBLIC UNIVERSITIES AND STATE  
21 UNIVERSITIES WITHIN THE STATE OF MICHIGAN, LIKE MICHIGAN  
22 STATE, WESTERN MICHIGAN AND SO FORTH. SO IT STANDS ALONE.  
23 IT IS A VERY LARGE UNIVERSITY. IT HAS A FAIRLY  
24 SIGNIFICANT SIZE UNDERGRADUATE PROGRAM. AND THAT PROGRAM IS  
25 ACROSS A BROAD RANGE OF SUBJECT AREAS. MANY OF THOSE AREAS  
26 ARE NATIONALLY RENOWNED.  
27 BUT IT IS ALSO VERY WELL-KNOWN FOR ITS GRADUATE  
28 WORK. AND THE GRADUATE SCHOOLS ARE VERY LARGE AND THEY ARE  
4346  
1 WELL-RESPECTED ON THE CAMPUS. FOR INSTANCE, THE LAW SCHOOL  
2 AT MICHIGAN IS WELL-KNOWN AND WELL-RESPECTED. THE MEDICAL  
3 SCHOOL. THERE'S A LARGE MEDICAL COMPLEX. THE BUSINESS  
4 SCHOOL, ENGINEERING, NATURAL RESOURCES. A WHOLE RANGE OF  
5 GRADUATE SCHOOLS IN VARIOUS DISCIPLINES.  
6 AND I'M DELIGHTED, BECAUSE ALMOST ALL OF THEM, IF  
7 NOT ALL OF THEM, IN ALL OF THE RANKINGS THAT COME OUT, ARE  
8 RANKED IN THE -- AMONG THE TOP 10 UNIVERSITIES, IN SOME  
9 CASES, THE TOP FIVE UNIVERSITIES, AND IN A COUPLE OF  
10 INSTANCES, THE TOP UNIVERSITY.  
11 Q. SO IT'S FAIR TO SAY THAT THE UNIVERSITY OF  
12 MICHIGAN WHERE YOU TEACH AND HAVE TAUGHT FOR 35 YEARS IS A  
13 VERY LARGE AND VERY PRESTIGIOUS UNIVERSITY?  
14 A. YES. AND IT REGARDS ITSELF IMPORTANTLY AS A  
15 KIND OF NATIONAL UNIVERSITY, NOT JUST FOR THE STATE OF  
16 MICHIGAN. AND INCREASINGLY, IN RECENT YEARS, AN  
17 INTERNATIONAL UNIVERSITY.  
18 WITHIN THE BUSINESS SCHOOL, ONE-THIRD OF OUR  
19 STUDENTS COME FROM OVERSEAS.  
20 Q. NOW, YOU SAID YOU GOT ON TO THE TENURE TRACK  
21 AFTER YOU FINISHED YOUR PH.D.?  
22 A. YES.  
23 Q. AND THEN YOU WERE AWARDED TENURE EVENTUALLY; IS  
24 THAT RIGHT?  
25 A. YES. I GOT ON THE TENURE TRACK IN 1969. I  
26 BELIEVE IT'S '73 OR '74 I WAS PROMOTED TO ASSOCIATE  
27 PROFESSOR AND GIVEN LIFETIME TENURE.  
28 Q. AND APPROXIMATELY WHAT PERCENTAGE OF THE FACULTY  
4347  
1 MEMBERS IN THE BUSINESS SCHOOL, LIKE YOU, WERE AWARDED  
2 TENURE?  
3 A. IT HAS BEEN CHANGING OVER TIME. AND FEWER AND  
4 FEWER PEOPLE ARE GAINING TENURE THESE DAYS. AT THE CURRENT  
5 TIME, SOMEWHERE AROUND 10 TO 15 PERCENT OF THE PEOPLE WHO

6 COME IN AT THE BEGINNING STAGE NOW ATTAIN TENURE.  
7 Q. NOW, DO YOU NOW HAVE SOMETHING CALLED AN ENDOWED  
8 CHAIR?  
9 A. YES. ACTUALLY, I WAS PROMOTED TO FULL PROFESSOR  
10 I BELIEVE IT WAS 1977 OR '78, IN AROUND THAT PERIOD OF TIME,  
11 WHICH IS SUPPOSED TO BE THE END OF THE LINE FOR PROFESSORS.  
12 BUT IN 1980, I WAS AWARDED AN ENDOWED CHAIR, THE  
13 WINKELMAN CHAIR, W-I-N-K-E-L-M-A-N, NAMED AFTER THE TWO  
14 GENTLEMEN WHO FOUNDED THE WINKELMAN RETAIL CHAIN.  
15 IN EFFECT, WHAT HAPPENED WAS THE FAMILY AND  
16 BUSINESS ASSOCIATES RAISED MONEY AND PLEDGED THEIR OWN MONEY  
17 INTO A FUND TO SUPPORT -- AT LEAST SOME OF THE MONEY TO PAY  
18 MY SALARY, AND ALSO TO PROVIDE RESEARCH SUPPORT FOR ME.  
19 Q. SO THIS ENDOWED CHAIR, THAT IS A SPECIAL HONOR;  
20 IS THAT RIGHT?  
21 A. YES. THAT'S WHAT THEY TELL ME.  
22 I'M SUPPOSED TO BE ONE OF THESE HONORED PEOPLE.  
23 SOMETIMES I HAVE A HARD THEM WITH THE WORD "HONOR."  
24 Q. AN ENDOWED CHAIR IS WHAT'S AFTER THE NORMAL END  
25 OF THE LINE FOR AN ACADEMIC CAREER?  
26 A. TRUTHFULLY, IN THE BROCHURE THAT WAS PUT OUT WHEN  
27 I GOT THIS THING, IT'S DESCRIBED AS THE CULMINATION OF AN  
28 ACADEMIC CAREER.

4348  
1 Q. NOW, HAS ANYONE AT THE BUSINESS SCHOOL AT THE  
2 UNIVERSITY OF MICHIGAN BEEN AN ACTIVE MEMBER OF THE FACULTY  
3 LONGER THAN YOU HAVE?  
4 A. AT THE PRESENT MOMENT, I'M IT. I HAVE SERVED  
5 LONGER THAN ANY OTHER SINGLE PERSON ON THE FACULTY, ON THE  
6 ACTIVE FACULTY TODAY.  
7 EVEN THE DEAN HASN'T BEEN THERE AS LONG AS I  
8 HAVE.  
9 Q. HAVE YOU SERVED AS THE CHAIRMAN OF THE MARKETING  
10 FACULTY AT THE UNIVERSITY OF MICHIGAN?  
11 A. YES. IN THE 1980S, I WAS ELECTED CHAIRMAN OF THE  
12 DEPARTMENT AND SERVED THE USUAL THREE-YEAR TERM AS CHAIRMAN.  
13 Q. NOW, OVER THE COURSE OF YOUR 35 YEARS OF TEACHING  
14 AT THE UNIVERSITY OF MICHIGAN BUSINESS SCHOOL, ABOUT HOW  
15 MANY COURSES HAVE YOU TAUGHT?  
16 A. I TRIED TO REFLECT ON THAT AND THE NUMBER, BUT IT  
17 ENDS UP IN THE THOUSANDS.  
18 I MEAN, OF COURSE, VARIOUS COURSES THAT I'VE  
19 TAUGHT AT ALL LEVELS.  
20 Q. IF YOU COULD GIVE US A BRIEF SUMMARY OF THE KIND  
21 OF COURSES THAT YOU HAVE ACTUALLY TAUGHT AT THE UNIVERSITY  
22 OF MICHIGAN.  
23 A. AS SOON AS I GOT THERE, I TAUGHT THE BASIC  
24 MARKETING MANAGEMENT COURSE, BOTH IN THE UNDERGRADUATE AND  
25 THE GRADUATE AREAS.  
26 I HAVE TAUGHT -- LET ME SEE -- RETAILING, RETAIL  
27 MARKETING MANAGEMENT, TAUGHT ADVERTISING MANAGEMENT.  
28 IN RECENT YEARS, I HAVE FOCUSED MYSELF ON THE NEW

4349  
1 AREA THAT IS DEVELOPING IN MARKETING CALLED SERVICE  
2 MARKETING MANAGEMENT.  
3 I TAUGHT A THING CALLED DISTRIBUTION COST  
4 ANALYSIS MANY YEARS AGO. AND I HAVE TAUGHT CONSUMER  
5 BEHAVIOR AND TAUGHT CHANNEL MANAGEMENT.  
6 I TRIED TO THINK ABOUT WHAT -- IN A WAY, WHAT I  
7 HAVEN'T TAUGHT. ONE THING THAT COMES TO MIND, I NEVER  
8 TAUGHT SALES FORCE MANAGEMENT.  
9 Q. BUT YOU HAVE SPECIFICALLY TAUGHT CONSUMER  
10 BEHAVIOR; IS THAT RIGHT?

11 A. YES, I HAVE. AND I TAUGHT IT IN THE PH.D.  
12 PROGRAM, AND FAIRLY RECENTLY.  
13 Q. THAT'S TO GRADUATE STUDENTS?  
14 A. THAT WAS TO DOCTORAL STUDENTS, YES.  
15 Q. NOW, I UNDERSTAND YOU ALSO TEACH PEOPLE OTHER  
16 THAN SIMPLY STUDENTS AT THE UNIVERSITY OF MICHIGAN.  
17 COULD YOU TELL US A LITTLE BIT ABOUT THAT,  
18 PLEASE.  
19 A. WELL, THERE ARE A COUPLE OF WAYS OF LOOKING AT  
20 IT.  
21 FIRST OF ALL, I TEACH PEOPLE WHO ARE NOT STUDENTS  
22 AT THE UNIVERSITY OF MICHIGAN BUT COME TO THE UNIVERSITY OF  
23 MICHIGAN, EXECUTIVES. AND THEY PARTICIPATE IN OUR EXECUTIVE  
24 EDUCATION PROGRAM.  
25 I TEACH -- I TEACH THAT ON A REGULAR BASIS.  
26 THEN, I ALSO TEACH PEOPLE IN OUR EXECUTIVE  
27 PROGRAM ELSEWHERE IN THE WORLD. I TEACH PEOPLE WHO HAVE  
28 BEEN RETAINED -- HAVE COME TO THE UNIVERSITY AND SAID,  
4350  
1 "WOULD YOU HAVE SOMEBODY COME AND TEACH WITHIN OUR COMPANY  
2 TO HELP US UNDERSTAND BETTER, SAY, MARKETING."  
3 THEN I ALSO TEACH EXECUTIVES IN COMPANIES WHERE  
4 COMPANIES HAVE COME TO ME AND ASKED ME TO RUN A PROGRAM FOR  
5 THEM.  
6 AND THEN I HAVE TAUGHT -- I HAVE TAUGHT OVERSEAS  
7 AND BEEN ADVISING PROFESSORS AT THE INSTITUTE -- I WILL USE  
8 THE ENGLISH LANGUAGE -- THE INSTITUTE FOR THE ADMINISTRATION  
9 OF THE ENTERPRISE, WHICH IS A PART OF THE UNIVERSITY OF  
10 MARSEILLES IN AIX-EN-PROVENCE, FRANCE.  
11 Q. AND YOU HAVE TRAVELED TO OTHER COUNTRIES TO  
12 EITHER CONSULT WITH COMPANIES OR TO TEACH CLASSES TO  
13 EXECUTIVES; IS THAT RIGHT?  
14 A. YES. I HAVE GOT A LOT OF FREQUENT FLYER POINTS,  
15 I NOTICED RECENTLY.  
16 Q. THOSE COUNTRIES WOULD INCLUDE JAPAN, BRAZIL, SOME  
17 OTHER EUROPEAN COUNTRIES?  
18 A. YES. I HAVE TAUGHT IN BRAZIL FOR ACTUALLY 14  
19 YEARS.  
20 AND THE OTHER COUNTRIES, FOR EXAMPLE, WOULD  
21 INCLUDE KUWAIT, TAIWAN, MAINLAND CHINA, HONG KONG, KOREA.  
22 THOSE ARE IN THE LAST TWO YEARS.  
23 Q. AND HAVE YOU CONDUCTED SEMINARS FOR ANY LARGE  
24 CORPORATIONS HERE IN THE UNITED STATES?  
25 A. YES, I HAVE.  
26 Q. COULD YOU GIVE US THE NAME OF THREE OR FOUR OF  
27 THOSE.  
28 A. I HAVE DONE SEMINARS FOR ALL OF THE BABY BELLS --  
4351  
1 NOT ALL, BUT A LARGE NUMBER OF THE FORMER BELL TELEPHONE  
2 COMPANIES, LIKE SOUTHWESTERN BELL, SOUTHERN BELL, AMERITECH,  
3 NINEX, U.S. WEST AND SO FORTH.  
4 I'VE DONE THEM FOR AT&T OVER A CONSIDERABLE  
5 PERIOD OF TIME. I HAVE BEEN IN THAT TELEPHONE INDUSTRY  
6 QUITE A BIT.  
7 I HAVE ALSO DONE THEM FOR EDS -- THAT'S THE  
8 COMPANY THAT ROSS PEROT FOUNDED -- GENERAL MOTORS, FORD  
9 MOTOR COMPANY. THOSE ARE JUST AN EXAMPLE.  
10 Q. I'LL TRY AND SHORTEN THIS UP A LITTLE BIT.  
11 HAVE YOU SERVED ON SOMETHING CALLED THE NATIONAL  
12 ADVERTISING REVIEW BOARD?  
13 A. YES, I HAVE.  
14 Q. AND COULD YOU EXPLAIN WHAT THAT ORGANIZATION IS  
15 AND WHAT YOUR INVOLVEMENT WITH IT WAS.



16 A. AS BRIEFLY AS I CAN.  
17 WITHIN THE ADVERTISING AREA, WHEN PEOPLE --  
18 DIFFERENT COMPANIES ADVERTISE, SOMETIMES THEY USE  
19 COMPARATIVE ADVERTISING. THEY MENTION EACH OTHER. THEY  
20 MAKE CLAIMS AT TIMES. AND THOSE SOMETIMES ARISE INTO  
21 DISPUTES.  
22 IN AN ATTEMPT TO GET OUTSIDE OF THE COURT SYSTEM  
23 AND TO HAVE THESE THINGS SETTLED MORE RAPIDLY, THERE WAS  
24 DEVELOPED THE NATIONAL ADVERTISING REVIEW BOARD. AND HOW IT  
25 WORKS IS THAT SOMEBODY WHO HAS A DISPUTE COMES AND REGISTERS  
26 THE DISPUTE WITH THIS KIND OF -- IT'S NOT REALLY A LEGAL  
27 AUTHORITY -- IT'S KIND OF A QUASI-LEGAL AUTHORITY WHO THEN  
28 HEAR BOTH SIDES OF THE CASE AND MAKE A RECOMMENDATION.

4352

1 IF INDEED THE RECOMMENDATION IS NOT AGREED TO,  
2 THEN IT GETS KICKED UP, SO TO SPEAK, TO THE NATIONAL  
3 ADVERTISING REVIEW BOARD, OF WHICH I WAS A MEMBER.  
4 THAT CONSISTS OF REPRESENTATIVES FROM -- A GROUP  
5 OF REPRESENTATIVES FROM COMPANIES, A GROUP OF  
6 REPRESENTATIVES FROM ADVERTISING AGENCIES, AND THEN  
7 REPRESENTATIVES WHO ARE REPRESENTATIVE OF THE PUBLIC.  
8 I WAS ONE OF THE PUBLIC MEMBERS, AND WAS  
9 NOMINATED FOR THAT POSITION BY THE BETTER BUSINESS BUREAUS  
10 OF THE UNITED STATES.

11 Q. HAVE YOU WRITTEN OR COAUTHORED ARTICLES ON THE  
12 SUBJECT OF MARKETING?

13 A. YES, I HAVE.

14 Q. ABOUT HOW MANY?

15 A. LAST COUNT, ABOUT 70.

16 Q. COULD YOU GIVE US SOME -- NOT TOO MANY -- SOME  
17 EXAMPLES OF THE SUBJECTS YOU'VE WRITTEN ON IN THE PAST.

18 A. I WON'T GO THROUGH THE WHOLE LAUNDRY LIST. THEY  
19 START -- DEAL WITH RETAILING. I HAVE DONE THINGS THAT  
20 ADDRESS THE QUESTION OF HOW SENIOR CITIZENS MAKE DECISIONS  
21 ON FASHIONS. I'VE DONE THINGS THAT DEAL WITH WRITTEN THINGS  
22 ON SERVICE MANAGEMENT ISSUES, NEW PRODUCT DEVELOPMENT.

23 THERE IS A WHOLE SERIES OF ARTICLES THAT  
24 CONCERNED THEMSELVES WITH SMOKING BEHAVIOR AND THE JOE CAMEL  
25 CAMPAIGN.

26 SO THERE ARE A WHOLE SERIES OF ARTICLES IN THERE.

27 Q. NOW, DO YOU HAVE A SCHOLARLY JOURNAL THAT YOU'RE  
28 THE EDITOR OR COEDITOR OF?

4353

1 A. YES. A COLLEAGUE OF MINE AND I COFOUNDED, IN  
2 1978, A JOURNAL CALLED "CURRENT ISSUES AND RESEARCH AND  
3 ADVERTISING."

4 WE'VE SINCE CHANGED THE NAME TO "JOURNAL OF  
5 CURRENT ISSUES AND RESEARCH AND ADVERTISING." THIS IS KIND  
6 OF A REPOSITIONING OR MARKETING THING WE'VE DONE.

7 IT'S A REFEREED BLIND REVIEW JOURNAL AND HAS BEEN  
8 IN EXISTENCE FROM 1978 UNTIL TODAY. AND I'M STILL THE  
9 COEDITOR.

10 Q. HAS DR. RICHARD POLLAY PUBLISHED ANY ARTICLES IN  
11 THAT JOURNAL?

12 A. YES, HE HAS. TWICE.

13 Q. YOU HAVE EDITED THOSE?

14 A. YES.

15 Q. DO YOU ALSO WORK ON OTHER SCHOLARLY JOURNALS  
16 OTHER THAN THE ONE THAT YOU HAVE GOT YOURSELF?

17 A. YES, I DO. I'M ON THE EDITORIAL REVIEW BOARD OF  
18 THE JOURNAL OF ADVERTISING, EUROPEAN JOURNAL OF PRODUCT  
19 INNOVATION MANAGEMENT.

20 I ALSO SERVE AS AN AD HOC REVIEWER FOR THE

21 JOURNAL OF MARKETING, JOURNAL OF MARKETING RESEARCH, JOURNAL  
22 OF BUSINESS RESEARCH, THE INTERNATIONAL JOURNAL OF SERVICE  
23 INDUSTRY MANAGEMENT.

24 AND THEN I SERVE AS A REVIEWER ON A WHOLE BUNCH  
25 OF DIFFERENT CONFERENCES, ACADEMIC MEETINGS.

26 AND I'M ON THE SCIENTIFIC COMMITTEE FOR THE  
27 LAST -- I THINK IT'S EIGHT YEARS -- FOR THE INTERNATIONAL  
28 SEMINAR ON MARKETING COMMUNICATIONS. THAT'S HELD IN FRANCE.

4354

1 Q. AND THE REVIEWING YOU DO, THAT'S PEER-REVIEWING?

2 A. YES. TO UNDERSTAND WHAT HAPPENS IN THE PROCESS  
3 OF PEER-REVIEWING, PEOPLE SEND IN MANUSCRIPTS. I GET THEM.  
4 I HAVE NO IDEA WHO WROTE THEM, AND I REVIEW THEM, GIVE MY  
5 RECOMMENDATIONS BACK TO THE EDITOR.

6 AND HE PASSES THEM ALONG TO WHOEVER THE AUTHOR  
7 WAS. THAT'S WHAT I DO.

8 Q. THAT'S WHAT'S CALLED DOUBLE-BLIND REVIEWING?

9 A. YES. IT IS DOUBLE-BLIND REVIEWING.

10 AND IT MEANS THAT THE REVIEWER HAS NO IDEA WHO  
11 WROTE THE ARTICLE AND THE PERSON WHO WROTE THE ARTICLE HAS  
12 NO IDEA WHO REVIEWED THE ARTICLE.

13 Q. NOW, THE JOURNALS THAT YOU HAVE DONE THIS PEER  
14 REVIEW WORK ON, ARE THEY CONSIDERED TO BE SOME OF THE TOP  
15 JOURNALS IN YOUR FIELD OF MARKETING?

16 A. YES, THEY ARE.

17 Q. HAVE YOU EVER BEEN RETAINED AS AN EXPERT BY  
18 GOVERNMENTAL BODIES OR COURTS?

19 A. YES, I HAVE.

20 Q. WHY DON'T YOU DESCRIBE SOME OF THOSE FOR US,  
21 PLEASE.

22 A. I HAVE BEEN RETAINED BY THE FEDERAL GOVERNMENT IN  
23 A NUMBER OF INSTANCES DEALING WITH COIN AND CURRENCY. I DID  
24 WORK ON THE SUSAN B. ANTHONY DOLLAR, THE MARKETING OF IT.

25 I GUESS I BETTER QUICKLY MENTION THAT I DID OFFER  
26 THE OPINION THAT IT WAS GOING TO BE A FAILURE. AND I GUESS  
27 I WAS RIGHT.

28 I ALSO DID ALL THE WORK ON THE MARKETING -- OR AT  
4355

1 LEAST THE MARKETING RESEARCH IN CONJUNCTION WITH THE  
2 OFFERING OF THE OLYMPIC COINS IN CONJUNCTION WITH THE LOS  
3 ANGELES OLYMPICS A COUPLE OF YEARS AGO.

4 FOR 13 YEARS -- THAT WAS FOR THE TREASURER OF THE  
5 UNITED STATES.

6 THEN FOR 13 YEARS, I WAS RETAINED BY THE SECRET  
7 SERVICE, THE FEDERAL RESERVE BOARD OF GOVERNORS, AND THE  
8 BUREAU OF ENGRAVING AND PRINTING TO LOOK AT AND RESEARCH  
9 WHAT WOULD BE THE PUBLIC'S REACTION TO A CHANGE IN THE  
10 UNITED STATES PAPER CURRENCY.

11 I ALSO HAVE SERVED IN TWO OTHER MAYBE OCCASIONS,  
12 AND THIS IS IN THE AREA OF LITIGATION. I WAS RETAINED BY  
13 THE INSURANCE COMMISSIONER OF THE STATE OF MICHIGAN RECENTLY  
14 IN A CASE THAT INVOLVED INSURANCE FRAUD.

15 AND THEN IN THE SECOND CASE THAT I WAS INVOLVED  
16 IN, I WAS RETAINED BY THE FEDERAL DISTRICT COURT IN SAN  
17 DIEGO, CALIFORNIA TO DO A PRESENT VALUE ANALYSIS FOR THE  
18 JUDGE IN THAT CASE.

19 Q. NOW, BEFORE YOU BECAME A PROFESSOR OF  
20 MARKETING -- I REALIZE THAT'S A LONG TIME AGO -- DID YOU  
21 HAVE ANOTHER PROFESSION?

22 A. YES, I DID.

23 Q. AND WHAT WAS THAT?

24 A. THAT'S MY OTHER LIFE.

25 STARTING IN 1951, I WAS A BROADCAST NEWSMAN, AND

26 SERVED IN THAT ROLE FULL TIME UNTIL 1963. ACTUALLY, I DID  
27 MY LAST BROADCAST IN 1965.

28 Q. DURING THE TIME PERIOD THAT YOU WERE A NEWS  
4356

1 REPORTER, DID YOU APPEAR ON TELEVISION?

2 A. YES, I DID. I WAS -- BY THE TIME I WAS, I GUESS,  
3 A SENIOR IN COLLEGE, I WAS WHAT IS NOW KNOWN KIND OF AS AN  
4 ANCHOR PERSON.

5 BUT I WAS ALSO A WORKING NEWSMAN OUT ON THE  
6 STREET, DOING STORIES, YES.

7 Q. AND DID YOU PERSONALLY DO ANY REPORTING ON ISSUES  
8 HAVING DO WITH SMOKING AND HEALTH DURING THE TIME THAT YOU  
9 WERE A NEWSMAN?

10 A. YES, I RECALL THEM.

11 Q. NOW, HAVE YOU CONDUCTED AN INVESTIGATION INTO THE  
12 FACTS OF THIS CASE, DOCTOR?

13 A. YES, I HAVE.

14 Q. AND WHAT KIND OF PREPARATION SPECIFIC TO THIS  
15 CASE HAVE YOU DONE?

16 A. SPECIFIC TO THIS CASE, I READ WHAT IS CALLED THE  
17 COMPLAINT THAT CAME FROM THE PLAINTIFF. I ALSO READ THE  
18 DEPOSITION OF MRS. WHITELEY. I READ THE DEPOSITION OF MRS.  
19 WHITELEY'S CURRENT HUSBAND. I READ THE DEPOSITION OF MRS.  
20 WHITELEY'S FIRST HUSBAND, THE DEPOSITIONS OF THE VARIOUS  
21 BROTHERS AND SISTERS OF MRS. WHITELEY, THE DEPOSITION OF  
22 A -- I BELIEVE A PSYCHIATRIST WHO HAD EXAMINED AT LEAST THE  
23 MEDICAL RECORDS OF MRS. WHITELEY AND OFFERED SOME OPINIONS.  
24 AND THEN I READ THE DEPOSITIONS OF DR. RICHARD POLLAY.

25 Q. AND LET'S TURN NOW AND TALK A LITTLE BIT ABOUT  
26 THE ROLE THAT MARKETING PLAYS IN CONSUMER BEHAVIOR OR  
27 CONSUMER CHOICES.

28 I TAKE IT THAT THE RELATIONSHIP BETWEEN MARKETING  
4357

1 AND CONSUMER BEHAVIOR IS A BIG CHUNK OF WHAT YOU DO IN TERMS  
2 OF STUDYING CONSUMER BEHAVIOR?

3 A. YES, IT IS. IN FACT, CONSUMER BEHAVIOR OF THE  
4 STUDY -- THE STUDY OF CONSUMER BEHAVIOR IS GENERALLY  
5 REGARDED AS A SUBPART OF THE MARKETING DISCIPLINE.

6 Q. AND YOU'VE STUDIED THIS SUBJECT OVER, WHAT, THE  
7 LAST 35, 40 YEARS?

8 A. YES. IN FACT, I WAS IN AT KIND OF -- I'M VERY  
9 PLEASED TO HAVE BEEN IN KIND OF THE BEGINNING OF THE MODERN  
10 ERA OF CONSUMER BEHAVIOR, AND WORKED NOT ONLY AS A FIRST  
11 RESEARCH ASSISTANT TO BUT HAD AS THE CHAIRMAN OF MY  
12 DISSERTATION ONE OF THE ICONS IN CONSUMER BEHAVIOR, JOHN  
13 HOWARD.

14 MR. ESCHER: I THINK WE'VE GOT A DIAGRAM ON  
15 THIS.

16 I'D LIKE TO HAVE THAT MARKED.

17 YOUR HONOR, I'M GOING TO PROVIDE YOU NOW WITH  
18 YOUR COPY OF THE DEMONSTRATIVES, THREE-HOLE PUNCHED.

19 THE COURT: OKAY.

20 MR. ESCHER: THIS FIRST ONE WILL BE A FOAM  
21 BOARD, YOUR HONOR.

22 I BELIEVE THAT WILL BE MARKED AS NEXT IN ORDER,  
23 6261.

24 THE TOP RIGHT-HAND CORNER; IS THAT RIGHT?

25 THE CLERK: YES.

26 THE COURT: I TAKE IT, YOU HAVE CLEARED THESE  
27 WITH MS. CHABER AND SHE HAS NO OBJECTION TO THEM BEING  
28 SHOWN?

4358

1 MS. CHABER: NO OBJECTION.

2 THE COURT: THANK YOU.  
3 (DOCUMENT MORE PARTICULARLY  
4 LISTED IN THE INDEX MARKED  
5 FOR IDENTIFICATION DEFENDANTS'  
6 EXHIBIT # 6261)  
7 MR. ESCHER: Q. DOCTOR, IF YOU WOULD COME  
8 DOWN -- IF THAT'S APPROPRIATE, YOUR HONOR?  
9 THE COURT: YES, IT IS.  
10 MR. ESCHER: Q. -- AND EXPLAIN THE BOARD A  
11 LITTLE BIT.  
12 THE WITNESS: YOUR HONOR, WOULD IT BE ALL RIGHT  
13 IF I USE ONE OF THESE LASER POINTERS?  
14 THE COURT: CERTAINLY.  
15 THE WITNESS: THANK YOU.  
16 MR. ESCHER: Q. DOCTOR, IF YOU COULD GENERALLY  
17 DESCRIBE WHAT THIS CHART SHOWS. MAYBE IF YOU COULD START AT  
18 THE TOP, SORT OF EXPLAINING THE STRUCTURE, AND THEN GET A  
19 LITTLE BIT MORE IN DETAIL.  
20 MS. CHABER: I WOULD --  
21 MR. ESCHER: I WON'T ASK -- I'M JUST GOING TO  
22 ASK HIM TO DESCRIBE THE STRUCTURE. THEN I WILL ASK HIM  
23 SPECIFIC QUESTIONS.  
24 MS. CHABER: THANK YOU.  
25 THE WITNESS: FIRST OF ALL, WHAT I TRIED TO DO  
26 IN CREATING THIS IS TO AT LEAST GIVE AN INDICATION OF WHERE  
27 WE ARE IN OUR UNDERSTANDING --  
28 MS. CHABER: EXCUSE ME, YOUR HONOR.  
4359  
1 I DON'T MEAN TO BREAK IN, BUT I THINK SOME OF THE  
2 JURORS ARE HAVING DIFFICULTY SEEING. THEY HAVE BEEN TRYING  
3 TO GET YOUR ATTENTION.  
4 MR. ESCHER: OKAY. SHALL WE MOVE IT UP HERE?  
5 THE COURT: YES.  
6 MR. ESCHER: WHY DON'T WE DO THAT.  
7 IS THIS BETTER?  
8 Q. DOCTOR, GO AHEAD.  
9 A. WHAT I TRIED TO DO HERE, I HAVE TRIED TO EXPLAIN  
10 WHERE WE'RE AT IN OUR UNDERSTANDING OF THE PROCESS THAT  
11 CONSUMERS GO THROUGH -- BY THE WAY, I DON'T WANT TO SCARE  
12 YOU. I'M NOT GOING TO GIVE YOU A FULL CONSUMER BEHAVIOR  
13 LECTURE HERE. I WANT TO GIVE YOU AN APPRECIATION OF WHAT  
14 THE PROCESS -- WHAT THE STRUCTURE KIND OF LOOKS LIKE.  
15 AS BEST WE TODAY UNDERSTAND THIS, THAT THERE ARE  
16 TWO TYPES OF THINGS THAT GET PUT INTO OR INPUTTED TO YOU FOR  
17 MAKING A DECISION RELATIVE TO BUYING A GOOD OR A SERVICE.  
18 THOSE ARE THOSE THINGS THAT ARE NOT  
19 MARKETER-CONTROLLED. THOSE ARE THE THINGS WE DON'T  
20 CONTROL. I WILL EXPLAIN WHAT THOSE ARE IN A FEW MINUTES.  
21 THE OTHER THINGS ARE THOSE THINGS -- AND  
22 BASICALLY, THEY'RE THE FOUR P'S WE TALKED ABOUT A FEW  
23 MINUTES AGO. THOSE ARE THE FOUR P'S THAT ARE KIND OF  
24 MARKETER-CONTROLLED. THOSE ARE THE THINGS THAT WE AS  
25 MARKETERS CAN CHANGE.  
26 NOW, WHAT HAPPENS IS THAT THEY COME IN TO THESE  
27 BUYER CHARACTERISTICS. WE UNDERSTAND VERY CLEARLY THAT WE  
28 ARE DEALING WITH THE MOST COMPLEX THING ON THE FACE OF THE  
4360  
1 EARTH, A HUMAN BEING, AND A HUMAN BEING AS A WHOLE --  
2 MS. CHABER: YOUR HONOR, I WOULD LIKE TO HAVE  
3 THIS PROCEED BY QUESTION AND ANSWER.  
4 THIS IS GETTING VERY NARRATIVE.  
5 MR. ESCHER: I WILL GO AHEAD AND ASK ANOTHER  
6 QUESTION.

7                   THAT'S FINE.

8           Q.    THE MIDDLE PART OF THE CHART THAT YOU'VE REFERRED  
9 TO, DOCTOR, ARE THESE SOME CATEGORIES OR WORDS WE USE TO TRY  
10 AND DESCRIBE CHARACTERISTICS OF SPECIFIC INDIVIDUALS?

11          A.    YES. YOU WILL NOTICE, WE HAVE FOUR OF THEM. ONE  
12 HERE IS UNDER "CULTURAL."

13                THEN THERE IS A SECOND CATEGORY OR GROUP CALLED  
14 "SOCIAL."

15                THEN THERE'S A CATEGORY OR GROUP CALLED  
16 "PERSONAL."

17                AND THEN, FINALLY, OVER HERE IS A CATEGORY CALLED  
18 "PSYCHOLOGICAL CHARACTERISTICS."

19          Q.    SO BASICALLY, WHAT THIS CHART SHOWS IS THAT THERE  
20 ARE BOTH MARKETER-CONTROLLED AND UNMARKETER-CONTROLLED  
21 FACTORS FROM THE WORLD THAT IMPACT ON THE SPECIFIC HUMAN  
22 BEING THAT IS DESCRIBED BY A MULTITUDE OF DIFFERENT FACTORS,  
23 AND THAT THE RESULT IS A CONSUMER DECISION.

24                IS THAT FAIR?

25          A.    THAT'S VERY CORRECT. YOU SEE IT HERE, THE  
26 DECISION DOWN HERE (INDICATING). THERE'S ALL THESE THINGS  
27 THAT ARE IN BETWEEN.

28                MR. ESCHER: OKAY. LET'S TURN TO THE NEXT  
4361

1 DEMONSTRATIVE. AND THAT WILL BE MARKED AS 6262.

2                THE COURT: AS YOU GO THROUGH MARKING THESE,  
3 WOULD YOU JUST STATE THE TITLE FOR THE RECORD.

4                MR. ESCHER: YES. THE TITLE OF 6262, YOUR  
5 HONOR, IS "INPUTS FILTERED THROUGH THE BUYER'S  
6 CHARACTERISTICS IN THE BUYING DECISION PROCESS."  
7                   (DOCUMENT MORE PARTICULARLY  
8 LISTED IN THE INDEX MARKED  
9 FOR IDENTIFICATION DEFENDANTS'  
10 EXHIBIT # 6262)

11          MR. ESCHER: Q. LET ME PUT THIS UP, DOCTOR.  
12 I'M NOT SURE THAT ALL OF THE JURORS CAN SEE IT.  
13 LET ME SEE IF I CAN MOVE THIS BACK A LITTLE BIT, IF THAT  
14 WOULD HELP.

15                THE COURT: LET ME JUST SAY TO THE JURORS, IF  
16 YOU CAN'T SEE AT ANY TIME IN THIS CASE, INCLUDING NOW, JUST  
17 RAISE YOUR HAND, PLEASE. IF WE SEE NO HANDS, WE'LL ASSUME  
18 YOU CAN SEE.

19          MR. ESCHER: Q. DOCTOR, CAN YOU DESCRIBE THE  
20 STRUCTURE OF THIS CHART, WITHOUT GOING INTO ALL THE --

21          A.    THE STRUCTURE HERE IS TO TRY AND IDENTIFY WHAT  
22 ARE THE MARKETER-CONTROLLED ELEMENTS THAT ARE PUT IN THE  
23 DECISION, AND WHAT ARE NOT MARKETER-CONTROLLED ELEMENTS IN  
24 THE DECISION.

25                SO IN THE TOP HALF OF THIS CHART WHERE WE HAVE  
26 THE MARKETER-CONTROLLED FACTORS, WE HAVE GOT THE FOUR P'S  
27 THAT WE SAW BEFORE, TWO P'S AND TWO C'S. WE HAVE THE FOUR  
28 P'S THAT WE SAW BEFORE WITH SUBCATEGORIES THAT I DESCRIBED  
4362

1 IN MY DISCUSSION EARLIER.

2          Q.    WHAT THAT MEANS IS THAT THE MARKETER-CONTROLLED  
3 ASPECTS OF THE PRODUCT, FOR EXAMPLE, THE BRAND NAME, THE  
4 PACKAGE, WHAT THE PRODUCT IS LIKE PHYSICALLY AND SERVICES  
5 RELATED TO THE PRODUCT, AND THAT THAT HAS AN IMPACT ON THE  
6 BUYER; IS THAT FAIR?

7          A.    THAT IS CORRECT.

8          Q.    OKAY. COULD YOU DO THE SAME, EXPLAINING FOR THE  
9 SECOND P, WHICH IS PROMOTION.

10          A.    THE SECOND P, PROMOTION, YOU'LL NOTICE THERE IS  
11 ADVERTISING, AS I MENTIONED EARLIER, THE SALES FORCE, OTHER

12 CUSTOMER CONTACT, PEOPLE BESIDE THE SALES FORCE, FOR  
13 INSTANCE, REPAIR PERSON, TELEPHONE COMPANY. WE HAVE SALES  
14 PROMOTION.

15 THOSE THINGS THAT -- ONE OF THOSE MIGHT BE  
16 SOMETHING THAT IS GOING ON AS A RETAIL POINT OF SALE.

17 AND THEN WE HAVE PUBLIC RELATIONS. AND THIS IS  
18 KNOWN AS THE COMMUNICATION MIX (INDICATING).

19 Q. THE SECOND P UNDER PROMOTION?

20 A. RIGHT. OBVIOUSLY, THERE IS THE SUBMIXTURES THAT  
21 IS UNDER "ADVERTISING" HERE.

22 Q. HOW ABOUT THE THIRD P, WHICH IS PLACE?

23 A. WELL, THAT'S THE ONE THAT I MENTIONED EARLIER.  
24 THE TERMINOLOGY USUALLY IS CHANNELS, BUT IT'S THE DELIVERY  
25 SYSTEM FOR THE GOODS, SERVICES AND TRANSACTION.

26 THEN THOSE THINGS THAT GO ON AT THE POINT OF  
27 PURCHASE. FOR INSTANCE, IN A RETAIL STORE, IN THE CATALOG.  
28 THE MOST NEW WAY OF DOING THIS IS ON THE INTERNET.

4363

1 Q. DOCTOR, SLOW DOWN JUST A LITTLE BIT.

2 A. I'M SORRY.

3 THE COURT: LET ME JUST INTERRUPT FOR A MINUTE.  
4 WE HAVE HAD THIS WITH EVERY WITNESS, SO WE ARE NOT PICKING  
5 ON YOU. BUT ONE THING THAT IS VERY IMPORTANT IS NOT ONLY  
6 THAT YOU SPEAK A LITTLE SLOWER, WHICH WOULD BE GOOD, BUT  
7 ALSO THAT YOU DON'T STEP ON EACH OTHER'S LINES, BECAUSE THE  
8 COURT REPORTER CAN'T TAKE IT DOWN WHEN YOU ANTICIPATE A  
9 QUESTION OR YOU START ANSWERING BEFORE MR. ESCHER HAS  
10 FINISHED THE QUESTION. SHE HAS A TERRIBLE TIME GETTING BOTH  
11 OF YOU DOWN AT THE SAME TIME.

12 MR. ESCHER: I WILL WORK ON THAT TOO, YOUR  
13 HONOR.

14 THE WITNESS: THANK YOU, YOUR HONOR. I'M SORRY.

15 MR. ESCHER: Q. SO WE ARE AT THE FOURTH P NOW.

16 COULD YOU EXPLAIN HOW THE FOURTH P WORKS IN THE  
17 REAL WORLD.

18 A. IN THE REAL WORLD, THIS IS PRICE. AND IT NOT  
19 ONLY IS THE SETTING OF PRICE, HOW WE ADMINISTER THE PRICE,  
20 THINGS LIKE TRADE DISCOUNTING, WHAT WE DO TO THE PEOPLE IN  
21 THE CHANNEL OF DISTRIBUTION IN PRICING TO DISCOUNT.

22 THERE'S A THING CALLED SLOTTING FEES, THAT IS,  
23 THAT THIS IS WHAT WE MIGHT HAVE TO PAY TO GET ON THE SHELF,  
24 TO GET A SHELF POSITION OR TO EXPAND OUR SHELF POSITION.

25 AND THEN THERE IS THE AREA OF COUPONING, WHICH  
26 MOST OF US ARE FAMILIAR WITH; A NICKEL OFF, 50 CENTS.

27 Q. DOCTOR, IS THIS THE SORT OF CHART USED IN  
28 CONNECTION WITH TEACHING MARKETING STUDENTS AT THE

4364

1 UNIVERSITY OF MICHIGAN?

2 A. YES, IT IS.

3 Q. AT BOTH THE COLLEGE AND THE GRADUATE LEVELS?

4 A. OH, YES.

5 Q. LET'S TALK ABOUT CIGARETTES AS A PRODUCT FOR A  
6 MOMENT.

7 WOULD YOU, IN THE METHODOLOGY THAT YOU DESCRIBED  
8 HERE, CHARACTERIZE SLOTTING FEES FOR CIGARETTES TO BE AN  
9 ASPECT OF PRICE, THE FOURTH P?

10 A. OH, ABSOLUTELY.

11 Q. OKAY. AND HOW ABOUT COUPONS IN CONNECTION WITH  
12 THE SALE OF CIGARETTES; DO YOU CONSIDER THAT A PART OF PRICE  
13 AS WELL?

14 A. YES. COUPONS ARE GENERALLY THOUGHT OF AS PRICE,  
15 BECAUSE IT'S A TEMPORARY REDUCTION IN THE PRICE OF THE  
16 GOOD.

17 AND IT'S THE TEMPORARY REDUCTION THAT IS DONE FOR  
18 A NUMBER OF DIFFERENT REASONS, BUT WHEN YOU GET 10 CENTS  
19 OFF, IT'S A TEMPORARY THING.

20 Q. AND ALTHOUGH COUPONS SOMETIMES COME WITH  
21 PRODUCTS, DO YOU AT THE UNIVERSITY OF MICHIGAN TEACH THAT  
22 COUPONS ARE AN ASPECT OF ADVERTISING?

23 A. RARELY AS A PART OF ADVERTISING. IT'S MUCH MORE  
24 A PART OF PRICING.

25 Q. SO THIS IS THE MORE CONVENTIONAL APPROACH TO  
26 UNDERSTANDING COUPONING; IS THAT RIGHT?

27 A. THAT IS CORRECT.

28 Q. LET'S TALK ABOUT THE NOT MARKETER-CONTROLLED

4365

1 STUFF DOWN AT THE BOTTOM. WE DON'T NEED TO DO IT IN GREAT  
2 DETAIL.

3 IS IT FAIR TO SAY THAT WHAT WE'VE GOT HERE IS A  
4 LIST OF ECONOMIC, TECHNOLOGICAL, POLITICAL AND CULTURAL  
5 FACTORS THAT INFLUENCE PEOPLE?

6 A. ABSOLUTELY. THAT'S EXACTLY WHAT IT IS.

7 AND YOU CAN SEE THE VARIOUS SUBPARTS OF EACH ONE  
8 OF THOSE.

9 Q. AND THEN, IN THE MIDDLE, WE HAVE GOT THE BUYER'S  
10 CHARACTERISTICS. IS THAT BASICALLY WHAT WE WERE TALKING  
11 ABOUT IN THE PREVIOUS BOARD?

12 A. YES. IT'S BASICALLY -- MAYBE THE EASIEST WAY TO  
13 UNDERSTAND THIS IS THAT WE HAVE THESE AND THESE AS THE  
14 INPUTS TO THOSE BUYER CHARACTERISTICS WE TALKED ABOUT BEFORE  
15 (INDICATING).

16 AND IT'S KIND OF LIKE ALL THIS IS FED INTO THIS  
17 BOX. AND IF YOU THINK OF THAT BOX AS HAVING A BUNCH OF  
18 GEARS IN IT, A LOT OF GEARS GOING AROUND, THOSE ARE ALL  
19 THOSE OTHER THINGS WE SHOWED BEFORE, THEY'RE ALL MOVING AT  
20 DIFFERENT SPEEDS, SOMETIMES IN DIFFERENT DIRECTIONS.

21 THEY TAKE ALL OF THIS AND KIND OF MASH IT  
22 TOGETHER AND COME OUT WITH A DECISION.

23 Q. SO THAT'S WHAT WE ARE DOING?

24 A. YES.

25 Q. OKAY. FOR ANY SPECIFIC INDIVIDUAL, ARE ALL THE  
26 THINGS THAT WE HAVE LISTED ON THIS CHART OF EQUAL  
27 IMPORTANCE?

28 A. WELL, I THINK THE IMPORTANT THING TO LOOK AT --

4366

1 IF I CAN LOOK AT THE FIRST CHART, I THINK IN RESPONSE TO  
2 YOUR QUESTION, THAT WILL HELP.

3 IF YOU LOOK AT ALL OF THESE CHARACTERISTICS, EACH  
4 INDIVIDUAL HAS DIFFERENT CHARACTERISTICS AT DIFFERENT  
5 TIMES. AND EACH OF THOSE CHARACTERISTICS HAVE DIFFERENT  
6 IMPORTANCE AT DIFFERENT TIMES IN DIFFERENT SITUATIONS.

7 Q. I THINK YOU CAN TAKE THE STAND AGAIN, DOCTOR.

8 THANKS VERY MUCH.

9 (ATTORNEYS CONFER)

10 MR. ESCHER: Q. LET'S TALK FOR A MOMENT ABOUT  
11 HOW THE METHODOLOGY THAT YOU JUST DESCRIBED, OR A WAY OF  
12 UNDERSTANDING CONSUMER BEHAVIOR THAT YOU JUST DESCRIBED  
13 WORKS IN THE CONTEXT OF BUYING A PARTICULAR PRODUCT. LET'S  
14 TAKE, FOR EXAMPLE, TOOTHPASTE.

15 DO PEOPLE BRUSH THEIR TEETH BECAUSE OF  
16 ADVERTISING?

17 A. I WOULD DOUBT IT VERY MUCH.

18 Q. AND HOW WOULD YOU DESCRIBE PEOPLE'S DECISIONS TO  
19 HAVE CLEAN TEETH IN TERMS OF THE FACTORS WE HAVE DISCUSSED?

20 A. WELL, THERE CAN BE CONCEIVABLY A LOT OF FACTORS  
21 THAT WILL INFLUENCE YOU BRUSHING YOUR TEETH. AMONG THEM ARE

22 JUST, YOU KNOW, PHYSIOLOGICAL THINGS. "GOT A BAD TASTE IN  
23 MY MOUTH." OR, YOU KNOW, "FEELS LIKE THERE HAS BEEN A HORSE  
24 BEEN IN THERE SITTING AROUND IN MY MOUTH. I'VE GOT A BAD  
25 TASTE SO I WANT TO CLEAN THEM."

26 ALSO, WE ARE TAUGHT IN OUR EXPERIENCE, BY OUR  
27 PARENTS, FOR INSTANCE, THAT YOU NEED TO BRUSH YOUR TEETH,  
28 THAT THIS IS GOOD FOR YOUR HEALTH.

4367

1 I REMEMBER MY MOTHER KEPT TELLING ME, YOU KNOW,  
2 "BRUSH YOUR TEETH OR YOU'LL LOSE THEM." AND I DIDN'T LIKE  
3 THAT IDEA.

4 THEN, OF COURSE, WE GET RECOMMENDATIONS FROM  
5 DENTISTS. AND BECAUSE I HAVE A GUM PROBLEM, I'M CONSTANTLY  
6 GOING TO A DENTAL HYGIENIST WHO NOT ONLY TELLS ME ABOUT HOW  
7 I SHOULD BRUSH, WHEN I SHOULD BRUSH MY TEETH, HOW I  
8 SHOULD -- I MEAN, WHAT I SHOULD BRUSH MY TEETH WITH.

9 SO THAT'S JUST AN EXAMPLE OF HOW WE GET THAT KIND  
10 OF INFORMATION COMING AT US. THAT IS NOT REALLY  
11 ADVERTISING.

12 Q. SO WHAT IS THE ROLE OF MARKETING IN THE CONTEXT  
13 OF A PRODUCT LIKE TOOTHPASTE?

14 A. WELL, THE ROLE OF MARKETING -- I MEAN, IF YOU  
15 REMEMBER ALL OF THOSE FOUR P'S, THE ROLE OF MARKETING IS TO  
16 MAKE SURE, FOR INSTANCE, THAT OUR BRAND IS AVAILABLE, THAT  
17 PEOPLE KNOW WHERE IT CAN BE BOUGHT, THAT MARKETING CAN TELL  
18 THEM WHAT IS THE PRICE OF OUR BRAND AND HAVE IT AT A PRICE  
19 THAT WILL INDUCE PEOPLE TO BE INTERESTED IN OUR BRAND.

20 MARKETING'S ROLE IS TO MAKE SURE THAT THE  
21 PRESENTATION OF OUR BRAND OF TOOTHPASTE AT A RETAIL POINT OF  
22 SALE IS ADEQUATE AND/OR NOT THINGS LIKE STOCKOUTS, SO PEOPLE  
23 CAN'T GET IT.

24 THE ROLE OF MARKETING IS OBVIOUSLY ALSO  
25 CENTERED ON SOME ADVERTISING. AND THAT ADVERTISING IS  
26 DESIGNED TO MAKE SURE -- OR TRY TO HELP THE BRAND BE  
27 PROTECTED, SO TO SPEAK, FROM COMPETITORS, AND TO TRY AND SEE  
28 WHETHER OR NOT WE CAN CONVINCE PEOPLE TO MOVE FROM OUR BRAND

4368

1 OF TOOTHPASTE -- FROM THEIR BRAND OF TOOTHPASTE TO OUR BRAND  
2 OF TOOTHPASTE, IF YOU WANT, TO STEAL CUSTOMERS AWAY FROM OUR  
3 COMPETITORS.

4 Q. OR URGING CUSTOMERS AWAY FROM YOUR COMPETITORS?

5 A. RIGHT.

6 Q. AS A MARKETER, HOW WOULD YOU DESCRIBE THE  
7 DIFFERENCE BETWEEN A PRODUCT CATEGORY AND A BRAND INSIDE  
8 THAT PRODUCT CATEGORY?

9 A. WELL, I THINK THE BEST WAY TO LOOK AT A PRODUCT  
10 CATEGORY IS MAYBE ALMOST IN A WAY BY ILLUSTRATION.

11 A PRODUCT CATEGORY MIGHT BE SOAP DETERGENT. A  
12 BRAND WITHIN SOAP DETERGENT WOULD BE, FOR INSTANCE, TIDE.

13 SO A BRAND IS A COMPANY'S PRESENTATION OF A  
14 PRODUCT OR A SERVICE WITHIN A PRODUCT CATEGORY. AND PRODUCT  
15 CATEGORIES, FOR INSTANCE, COULD BE AUTOMOBILES.

16 Q. SO IN THE CONTEXT OF CIGARETTES, FOR EXAMPLE, THE  
17 PRODUCT WOULD BE CIGARETTES AND THE BRAND WOULD BE, FOR  
18 INSTANCE, CAMEL OR MARLBORO?

19 A. THAT IS CORRECT.

20 Q. BASED ON YOUR EXPERIENCE IN MARKETING AND  
21 ADVERTISING, DO YOU THINK THAT ADVERTISING HAS THE EFFECT OF  
22 CAUSING PEOPLE TO BUY A PRODUCT OR TO BUY A BRAND?

23 A. RARELY TO BUY A PRODUCT, ALTHOUGH THERE IS OR ARE  
24 INSTANCES WHERE WE BELIEVE AND PUT TOGETHER STRATEGIES IN  
25 ADVERTISING TO HAVE PEOPLE BUY A PRODUCT, AND THAT IS WHEN  
26 WE ARE DEALING WITH A NEW PRODUCT AND WE WANT TO TELL PEOPLE



27 THAT THE PRODUCT EXISTS AND WHAT VALUE IT DELIVERS TO THEM.  
28 IT'S PRINCIPALLY IN THE AREA OF NEW PRODUCTS THAT  
4369  
1 ADVERTISING FUNCTIONS IN THAT ROLE.  
2 Q. WAS IT YOUR UNDERSTANDING THAT ADVERTISING, FOR  
3 EXAMPLE, HAS THE ROLE OF INCREASING THE CONSUMPTION OF  
4 TOOTHPASTE?  
5 A. NO, I DON'T BELIEVE IT WILL CAUSE PEOPLE TO BRUSH  
6 MORE. ITS ROLE WOULD BE, FOR INSTANCE, TO HAVE PEOPLE  
7 SWITCH FROM COLGATE TO CREST OR TO HAVE PEOPLE CONTINUE TO  
8 BUY CREST.  
9 Q. THAT IS, THAT'S NOT SWITCH TO COLGATE?  
10 A. YES.  
11 Q. NOW, YOU'VE DONE CONSULTING AND TEACHING WORK FOR  
12 BOTH GENERAL MOTORS AND FORD MOTOR COMPANY; IS THAT RIGHT?  
13 A. YES.  
14 Q. THOSE ARE TWO VERY LARGE COMPANIES THAT ARE QUITE  
15 CLOSE TO [DELETED]?  
16 A. YES.  
17 Q. HAVE YOU EVER DISCUSSED WITH ANY OF THE MARKETING  
18 EXECUTIVES AT ANY OF THOSE COMPANIES WHETHER ADS FOR FORD  
19 END UP SELLING GENERAL MOTORS VEHICLES?  
20 A. NO. THAT'S AN INTERESTING PROPOSITION.  
21 BUT I CAN HARDLY SEE -- FIRST OF ALL, I HAVE NOT  
22 DISCUSSED IT WITH THEM, NO.  
23 Q. YOU HAVE NOT DISCUSSED IT WITH THEM.  
24 DOES THAT SEEM IMPLAUSIBLE TO YOU?  
25 A. YES, IT DOES. ACTUALLY, I'VE BEEN A CONSULTANT  
26 ALSO TO TOYOTA. NOW THAT I THINK OF IT, IT IS IMPLAUSIBLE,  
27 BECAUSE IF YOU WERE TO USE LOGIC, I SUPPOSE, AND YOU WERE  
28 GENERAL MOTORS, WHAT YOU WOULD DO IS JUST STOP ADVERTISING;  
4370  
1 THEREFORE, YOU WOULDN'T BE INFLUENCING FORD. YOU LET FORD  
2 ADVERTISE, SO THEY WOULD INFLUENCE YOUR SALES.  
3 IT'S JUST IMPLAUSIBLE. IT'S JUST FUNDAMENTALLY  
4 NOT LOGICAL.  
5 Q. YOU SAID THAT ADVERTISING CAN INCREASE THE DEMAND  
6 FOR SOME SORTS OF CONSUMER PRODUCTS, AND THOSE WERE  
7 PRIMARILY NEW PRODUCTS; IS THAT RIGHT?  
8 A. THAT'S CORRECT.  
9 Q. BUT THAT, IN GENERAL, THE ADVERTISING WE SEE OUT  
10 IN THE WORLD IS FOCUSED ON ADVERTISING A BRAND; RIGHT?  
11 A. THAT'S CORRECT.  
12 Q. NOW, THERE ARE SOME EXAMPLES OF ADVERTISING WHICH  
13 ISN'T FOCUSED ON A BRAND, AREN'T THERE?  
14 A. YES. OH, YES.  
15 Q. YOU FAMILIAR WITH "GOT MILK" ADS?  
16 A. THE MILK ADVERTISING CAMPAIGN IS ONE OF THE MOST  
17 CURRENT ONES OF THAT. THIS IS THE ONE WITH THE CELEBRITIES  
18 OR PEOPLE THAT HAVE THIS LITTLE WHITE MUSTACHE ACROSS  
19 (INDICATING). AND THAT'S NOT FOR A PARTICULAR BRAND. IT'S  
20 FOR A PRODUCT CATEGORY, MILK.  
21 Q. IT'S NOT A FOR-PROFIT COMPANY THAT'S ACTUALLY  
22 DOING THOSE ADS, IS IT?  
23 A. NO. IT'S THE MILK ASSOCIATION THAT IS DOING  
24 THAT.  
25 Q. OKAY. DO YOU HAVE A SENSE FOR WHETHER THOSE MILK  
26 ADS HAVE THE EFFECT OF INCREASING THE CONSUMPTION OF MILK?  
27 A. NO, I REALLY HAVEN'T STUDIED THEM IN DEPTH.  
28 A FEW YEARS AGO, I DID DO A STUDY OF A BEVERAGE  
4371  
1 CATEGORY. AND ONE OF THE THINGS THAT CAME OUT OF THAT STUDY  
2 FOR A REPORT TO THE FEDERAL TRADE COMMISSION WAS THAT MILK

3 CONSUMPTION HAD BEEN GOING DOWN IN THE UNITED STATES.  
4 AND SO AS I LOOK AT THOSE ADS, IT COMES TO MY  
5 MIND THAT THE REASON THEY'RE BEING RUN IS TO AT LEAST SLOW  
6 DOWN THE DECLINE IN THE SALE OF MILK.  
7 Q. NOW, YOU INDICATED BEFORE THAT SOME PRODUCTS ARE  
8 NEW TO THE MARKETPLACE AND OTHER PRODUCTS HAVE BEEN IN THE  
9 MARKETPLACE FOR A LONG TIME.  
10 DO YOU, IN MARKETING, HAVE A TERMINOLOGY THAT YOU  
11 USE TO DESCRIBE THE AGE OF PRODUCTS IN THE MARKETPLACE?  
12 A. YES, WE DO.  
13 Q. AND WHAT TERMINOLOGY IS THAT?  
14 A. THE TERMINOLOGY IS CALLED THE PRODUCT LIFE  
15 CYCLE. IT'S ONE OF THE OLDEST CONCEPTS IN MARKETING.  
16 Q. COULD YOU DESCRIBE WHAT THE PRODUCT LIFE CYCLE IS  
17 AS IT APPLIES TO MARKETING.  
18 A. WELL, THE CONCEPT HERE IS THAT WE HAVE  
19 PRODUCTS -- AND PRODUCTS ALMOST -- ALL PRODUCTS THAT WE CAN  
20 THINK OF ARE LIKE HUMAN BEINGS OR ANIMALS. THEY HAVE BIRTH  
21 AND THEY HAVE DEATH, AND THEY GO THROUGH VARIOUS PHASES IN  
22 THEIR LIFE.  
23 SO THERE'S THE BEGINNING PHASE WHEN THEY ARE  
24 BEING INTRODUCED. AND THEN DURING A PERIOD OF TIME THEY  
25 HAVE A GROWTH CYCLE, THEY'RE BEGINNING TO GROW IN SALES OVER  
26 A PERIOD OF TIME, AND THE NUMBER OF COMPETITORS CHANGES.  
27 AND THEN THERE'S A PHASE WHICH I THINK I'M IN,  
28 AND THAT IS LIKE -- AS A HUMAN BEING, THAT IS THE MATURE  
4372  
1 PHASE THAT YOU REACH. AND A PRODUCT REACHES THAT MATURE  
2 PHASE.  
3 AND I HOPE I'M NOT IN THE FINAL OF THE PHASES AT  
4 THIS POINT, AND THAT IS THE DECLINE PHASE.  
5 Q. COULD YOU GIVE THE MEMBERS OF THE JURY AN EXAMPLE  
6 OF A PRODUCT IN THE GROWTH PHASE.  
7 A. OH, A PRODUCT IN THE GROWTH PHASE, IT SEEMS TO BE  
8 MOVING VERY FAST IN THE GROWTH PHASE. TODAY WOULD PROBABLY  
9 BE DVD TECHNOLOGY. I THINK IT'S OUT OF THE INTRODUCTORY  
10 PHASE BY NOW.  
11 Q. HOW ABOUT A PRODUCT THAT IS IN ITS DECLINE PHASE.  
12 CAN YOU GIVE US AN EXAMPLE OF THAT?  
13 A. OH, YES. BLACK-AND-WHITE TELEVISION SETS. I  
14 DON'T KNOW WHETHER YOU CAN EVEN BUY THEM ANYMORE.  
15 Q. IS THE CONCEPT OF A PRODUCT LIFE CYCLE GENERALLY  
16 ACCEPTED AS AN APPROACH IN YOUR FIELD OF MARKETING?  
17 A. YES. ACTUALLY, I DID SOME RESEARCH ON THAT. I  
18 HAD TO GO BACK AND FIND OUT WHERE THE PRODUCT LIFE CYCLE HAD  
19 BEEN MENTIONED IN THE MARKETING LITERATURE, AND FOUND THAT  
20 IT'S -- I RAN OUT OF SPACE ON PAGES, BECAUSE THERE WERE SO  
21 MANY DIFFERENT CITATIONS TO THE PRODUCT LIFE CYCLE IN  
22 CURRENT PUBLICATIONS.  
23 AND AS YOU GO BACK THROUGH THE HISTORY OF  
24 MARKETING, THAT CONCEPT APPEARS. AND IN FACT, I FINALLY  
25 WENT BACK TO THE TEXTBOOK THAT I USED AS AN UNDERGRADUATE  
26 STUDENT. IT HAS BEEN OUT OF PRINT NOW FOR PROBABLY -- FROM  
27 MY LOOKS (INDICATING), A LONG TIME. AND IT ACTUALLY WAS  
28 PUBLISHED IN 1930.  
4373  
1 AND ONE OF THE CONCEPTS IN THERE WAS THE PRODUCT  
2 LIFE CYCLE.  
3 Q. IS THE PRODUCT LIFE CYCLE IN ITS MATURE PHASE  
4 NOW?  
5 A. I THINK SO, AFTER AT LEAST 70 YEARS.  
6 Q. BUT IT'S STILL AN ACCEPTED THEORY, ISN'T IT?  
7 A. OH, ABSOLUTELY. IN FACT, IT CONSTITUTES A WHOLE

8 CHAPTER IN THE MAINLINE, MOST SOLD MARKETING MANAGEMENT  
9 TEXTBOOK TODAY FOR GRADUATE STUDENTS.

10 Q. NOW, IS THE CONCEPT OF A PRODUCT LIFE CYCLE  
11 IMPORTANT TO A MANUFACTURER IN DEVELOPING A MARKETING PLAN?

12 A. OH, ABSOLUTELY.

13 Q. TELL US WHY.

14 A. THE REASON WHY IS BECAUSE, OVER TIME, THINGS HAVE  
15 TO CHANGE. WE HAVE TO CHANGE OUR STRATEGY OVER TIME. WE  
16 HAVE DIFFERENT EMPHASIS ON VARIOUS PARTS OF THE MARKETING  
17 MIX. THERE IS A DIFFERENT PHASE OF COMPETITORS THAT COME  
18 ON.

19 AND SO THERE IS A DIFFERENCE IN STRATEGY THAT HAS  
20 TO TAKE PLACE, VERY SIMILAR TO WHAT A HUMAN BEING GOES  
21 THROUGH.

22 WE HAVE DIFFERENT THINGS THAT WE DO OVER  
23 DIFFERENT PHASES OF OUR LIFETIME. THE SAME HOLDS TRUE FOR  
24 PRODUCTS IN THE PRODUCT LIFE CYCLE.

25 Q. HOW ABOUT CIGARETTES; WHERE ARE THEY IN THE  
26 PRODUCT LIFE CYCLE?

27 A. IF YOU LOOK AT THE CHARACTERISTICS THAT ARE  
28 ASSOCIATED WITH THE PRODUCT LIFE CYCLE, YOU CAN CONCLUDE  
4374

1 PRETTY FIRMLY THAT CIGARETTES ARE IN THE MATURE PHASE OF THE  
2 PRODUCT LIFE CYCLE, OR MAY EVEN BEEN IN THE DECLINING PHASE.

3 MR. ESCHER: LET'S HAVE THE NEXT BOARD MARKED AS  
4 6263.

5 (DOCUMENT MORE PARTICULARLY  
6 LISTED IN THE INDEX MARKED  
7 FOR IDENTIFICATION DEFENDANTS'  
8 EXHIBIT # 6263)

9 MR. ESCHER: YOUR HONOR, THIS PARTICULAR CHART  
10 DOES NOT HAVE A TITLE ON IT. IT'S SIMPLY A GRAPH, YOUR  
11 HONOR, THIS ONE (INDICATING). I BELIEVE IT'S THE NEXT ONE  
12 IN ORDER IN YOUR GROUP.

13 MS. CHABER: NO, NOT IN MINE.

14 THE COURT: IT'S NOT, BUT I'VE GOT IT.  
15 GO AHEAD.

16 MR. ESCHER: Q. DOCTOR, IF YOU COULD EXPLAIN  
17 HOW THIS CHART ILLUSTRATES YOUR TESTIMONY WITH RESPECT TO  
18 WHERE CIGARETTES ARE IN THE PRODUCT LIFE CYCLE.

19 A. WELL, VERY INDICATIVE OF IT BEING IN EITHER THE  
20 MATURE OR THE DECLINE PHASE.

21 YOU'LL NOTICE THAT THE RELATIONSHIP HERE OVER  
22 TIME, FROM 1965 UNTIL RECENT TIME, SHOWS THAT THE PERCENTAGE  
23 OF PEOPLE WHO ARE SMOKERS HAS BEEN DECLINING, AND DECLINING  
24 OVER THAT PERIOD OF TIME. THAT IS THE FIGURE IN THE MIDDLE.  
25 AND THAT THIS PHENOMENON EXISTS FOR BOTH MALES  
26 AND FEMALES IN OUR SOCIETY.

27 Q. PUTTING ASIDE NEW PRODUCTS, IS ADVERTISING IN THE  
28 SCHEME OF ALL THE INFLUENCES YOU DESCRIBED IN THE CONTEXT OF  
4375

1 THOSE FIRST TWO BOARDS WE LOOKED AT GENERALLY CONSIDERED TO  
2 BE A STRONG FORCE, A WEAK FORCE OR SOMEWHERE IN BETWEEN WITH  
3 RESPECT TO INFLUENCING CONSUMER BEHAVIOR?

4 A. WHEN WE TAKE ALL OF THE ASPECTS OF ALL OF THE  
5 FACTORS THAT ARE INPUTTED INTO THAT DECISION, IT ENDS UP  
6 BEING A RELATIVELY WEAK FORCE.

7 Q. DOCTOR, HAVE YOU PREPARED A CHART ILLUSTRATING  
8 SOME OF THE REASONS WHY ADVERTISING IS A WEAK FORCE ON THE  
9 CONSUMER DECISION PROCESS RELATIVE TO THOSE OTHER  
10 INFLUENCES?

11 A. YES, I HAVE.

12 MR. ESCHER: I'D LIKE TO SHOW THAT, YOUR HONOR,

13 NOW. IT'S ENTITLED "LIMITS OF MARKETING." AND I WILL HAVE  
14 THAT MARKED AS 6264, YOUR HONOR.

15 (DOCUMENT MORE PARTICULARLY  
16 LISTED IN THE INDEX MARKED  
17 FOR IDENTIFICATION DEFENDANTS'  
18 EXHIBIT # 6264)

19 MR. ESCHER: IF WE COULD GET THE LIGHTS,  
20 PLEASE.

21 Q. DOCTOR ARE YOU ABLE TO SEE?

22 A. I WAS GOING TO SUGGEST --

23 Q. YOU CAN'T SEE IT. WHY DON'T YOU COME DOWN.

24 A. WHAT I HAVE TRIED TO DO HERE IS TO GIVE YOU SIX  
25 REASONS WHY, IN MANY CASES, ADVERTISING IS A WEAK FORCE OR  
26 THERE ARE LIMITS FOR ADVERTISING.

27 THE FIRST OF THESE IS THAT "THE MESSAGE MAY NOT  
28 BE DELIVERED."

4376

1 Q. THAT MESSAGE BEING THE ADVERTISING MESSAGE?

2 A. THE ADVERTISING MESSAGE SIMPLY MAY NOT BE  
3 DELIVERED. IT MIGHT BE THAT YOU ARE JUST NOT THERE WHEN  
4 THAT ADVERTISING MESSAGE IS DELIVERED OR IT MAY BE THAT YOU  
5 JUST DON'T CARE TO LOOK AT IT. YOU GO BY IT.

6 AND WE USE A TERMINOLOGY WITHIN ADVERTISING THAT  
7 IS CALLED SELECTIVE EXPOSURE. I ONLY EXPOSE MYSELF TO  
8 CERTAIN ADVERTISEMENTS. I DON'T LOOK AT ALL OF THAT STUFF  
9 OUT THERE.

10 THE SECOND OF THESE IS THAT "THE MESSAGE MAY NOT  
11 BE RELEVANT OR LIKED." RELEVANT. FOR INSTANCE, I JUST  
12 RECENTLY BOUGHT A NEW CAR, A TOYOTA CAMRY.

13 I'M NOT IN THE MARKET FOR A CAR RIGHT NOW, SO I  
14 DON'T LOOK AT CAR ADVERTISING. I JUST SIMPLY DO NOT LOOK AT  
15 IT BECAUSE IT IS NOT RELEVANT TO ANY DECISION THAT I MIGHT  
16 BE GOING TO MAKE.

17 "THE MANNER IN WHICH THE MESSAGE IS DELIVERED IS  
18 IMPERSONAL." ADVERTISING, BY ITS VERY NATURE, IS IMPERSONAL  
19 IN NATURE.

20 NOW, IT MAY BE THE REASON IT HAS A LIMIT IS THAT  
21 SOMEBODY ELSE HAS CONVEYED A MESSAGE TO ME PERSONALLY. MY  
22 WIFE, MY FRIEND, MY CHILDREN, MY GRANDCHILDREN SAY SOMETHING  
23 TO ME, IT HAS FAR GREATER IMPACT THAN DOES ADVERTISING.

24 SO THE LIMIT ON ADVERTISING IS THE VERY NATURE OF  
25 IT IS IMPERSONAL. THERE IS A LOW CREDIBILITY.

26 MS. CHABER: YOUR HONOR --

27 MR. ESCHER: I WILL ASK ANOTHER QUESTION, YOUR  
28 HONOR.

4377

1 Q. IF YOU COULD TURN, DOCTOR, TO THE SECOND  
2 CATEGORY, WHICH IS "THE MESSAGE MAY NOT BE RELEVANT OR  
3 LIKED."

4 ARE YOU EXPLAINING THAT ONE NOW?

5 A. YES, I HAVE EXPLAINED THAT ONE.

6 Q. WHY DON'T WE GO TO LOW CREDIBILITY.

7 A. OKAY. WE COULD GO TO THE LOW CREDIBILITY.  
8 SORRY.

9 WE KNOW THAT, OVER TIME, AND FAIRLY QUICK IN  
10 LIFE, PEOPLE DEVELOP A SKEPTICISM ABOUT ADVERTISING, THAT  
11 PEOPLE UNDERSTAND WHY THEY ARE BEING ADVERTISED AT AND THAT  
12 THEY HAVE A VERY LOW LEVEL OF TRUST IN THAT ADVERTISING.

13 SO THERE'S POTENTIAL LOW CREDIBILITY OF THE  
14 MESSENGER THAT IS DELIVERING THAT TO US.

15 Q. HOW ABOUT THE NEXT ONE? WHAT DO YOU MEAN BY "THE  
16 "MESSAGE MAY BE DROWNED OUT IN A SEA OF 'CLUTTER'?"

17 A. WE ARE JUST -- WE ARE JUST INUNDATED WITH

18 MESSAGES EVERY DAY. AND MANY OF THOSE MESSAGES ARE  
19 ADVERTISING.  
20 AND IN FACT, WHEN I CONDUCT SEMINARS WITH  
21 EXECUTIVES, WHEN I BRING THIS PARTICULAR POINT UP, I SAY TO  
22 THEM, "WHY DON'T YOU, WHEN YOU GO BACK, START COUNTING --  
23 THE NEXT MORNING AND COUNT EVERY ADVERTISEMENT THAT COMES AT  
24 YOU, BUT DO QUIT BY 10:00 O'CLOCK IN THE MORNING BECAUSE YOU  
25 WILL BE EXHAUSTED."

26 SO THERE'S THIS SHEER CLUTTER; THE MASSIVE AMOUNT  
27 OF ADVERTISING THAT COMES AT YOU.

28 Q. THE FINAL ITEM, WHICH IS THE "COMPETING SOURCES  
4378 OF INFORMATION ARE MORE PERSONAL AND CREDIBLE." WHAT DO YOU  
2 MEAN BY THAT?

3 A. THERE ARE OTHER SOURCES THAT COME AT US AS OTHER  
4 THAN ADVERTISING, THAT COMES TO US SAY FROM PERSONAL  
5 SOURCES.

6 AN EXAMPLE WOULD BE -- A PERFECT EXAMPLE WOULD BE  
7 THE RESTAURANT HERE IN SAN FRANCISCO WHO ADVERTISES. AND I  
8 SEE THE ADVERTISEMENT AND IT TELLS ME ABOUT THE WONDERFUL  
9 CUISINE THAT IT HAS. AND THEN SOMEBODY WHO LIVES HERE COMES  
10 OVER AND SAYS "THE STUFF IS LOUSY."

11 I HAVE A COMPETING MESSAGE THERE, AND IT'S A  
12 STRONGER PERSONAL MESSAGE.

13 Q. SO ANOTHER EXAMPLE WOULD BE THE SPECIAL  
14 TOOTHPASTE THAT YOU ARE USING NOW THAT YOUR WIFE IS ALSO  
15 USING?

16 A. YES. MY WIFE -- WELL, MY WIFE. YES.

17 Q. I DON'T WANT TO GET TOO PERSONAL, YOUR HONOR.

18 A. THAT'S OKAY.

19 MS. CHABER: I DON'T THINK THERE WAS A QUESTION,  
20 OTHER THAN THAT THEY WERE BOTH USING THE SAME TOOTHPASTE.

21 THE WITNESS: ACTUALLY, WE'RE NOT. BUT SHE HAS  
22 BEEN TRYING TO GET ME TO USE THAT TOOTHPASTE.

23 MR. ESCHER: Q. SO THAT WOULD BE AN EXAMPLE OF  
24 COMPETING SOURCES OF INFORMATION BEING MORE CREDIBLE?

25 A. OH, YES. ABSOLUTELY. MY WIFE IS MORE CREDIBLE.

26 Q. OKAY. LET'S TALK A LITTLE BIT MORE ABOUT SOURCE  
27 CREDIBILITY, WHAT YOU MEAN BY THAT.

28 COULD YOU GIVE US ANOTHER EXAMPLE OF SOURCE

4379 CREDIBILITY SO --  
1

2 MS. CHABER: COULD WE HAVE THE WITNESS TAKE THE  
3 STAND?

4 MR. ESCHER: YES. HE CAN SIT DOWN. I'M SORRY.

5 Q. COULD YOU GIVE US AN EXAMPLE OF A SORT OF  
6 PERSONAL OR CATEGORY OF INDIVIDUALS OR PARTICIPANTS IN THE  
7 MARKETPLACE THAT HAVE A SOURCE CREDIBILITY PROBLEM.

8 A. YES. THERE ARE -- AND I APOLOGIZE IF ANYBODY IN  
9 THE ROOM IS A USED CAR SALESMAN -- BUT USED CAR SALESMEN DO  
10 HAVE A SOURCE CREDIBILITY ASSOCIATED WITH THEM. IF YOU ARE  
11 A USED CAR SALESMAN, UNFORTUNATELY, YOU LIVE WITH THAT.

12 PEOPLE -- WHEN PEOPLE HAVE BEEN ASKED, THEY POINT  
13 TO USED CAR SALESMEN AT THE BOTTOM, AS THE LOWEST AMOUNT OF  
14 CREDIBILITY ASSOCIATED WITH THEM.

15 THERE ARE PEOPLE WHO ALSO HAVE HIGH CREDIBILITY  
16 ASSOCIATED WITH THEM. AND IN THE DATA THAT I HAVE SEEN  
17 FROM THE GALLUP ORGANIZATION, THOSE PEOPLE TEND TO BE  
18 CLERGYMEN -- AND I DO SAY THAT'S GOOD -- COLLEGE PROFESSORS.

19 Q. MEDICAL DOCTORS AS WELL?

20 A. MEDICAL DOCTORS HAVE COME OFF QUITE HIGH.

21 NOW, THE RECENT DATA, THERE HAS BEEN A SLIGHT  
22 CHANGE. THE USED CAR SALESMAN HAS BEEN JOINED BY ANOTHER

23 CATEGORY, CONGRESSMEN. AND WITH APOLOGIES TO THE COUNSEL  
24 HERE IN THE ROOM, LAWYERS ARE ABOUT -- HAVE BEEN IN THE  
25 MIDDLE OF THE PACK, BUT THEY'VE BEEN FALLING OVER TIME.  
26 Q. SO WE ARE IN THE DECLINING PHASE?  
27 A. THAT'S CORRECT.  
28 Q. AND, OF COURSE, THESE POLLS DON'T DEAL WITH THE  
4380  
1 CATEGORY OF JUDGES, DO THEY?  
2 A. NO, YOUR HONOR.  
3 THE COURT: THANK GOODNESS.  
4 MR. ESCHER: Q. ABOUT HOW MUCH IS SPENT ON  
5 ADVERTISING IN THIS COUNTRY EVERY YEAR?  
6 A. THE ESTIMATE I HAVE HEARD IS APPROXIMATELY \$200  
7 BILLION.  
8 Q. AND APPROXIMATELY HOW MUCH OF THAT AMOUNT IS FOR  
9 ADVERTISING BY CIGARETTE COMPANIES?  
10 A. ONE HALF OF 1 PERCENT.  
11 Q. ONE HALF OF 1 PERCENT?  
12 A. ABOUT A HALF A PENNY A DOLLAR.  
13 Q. AND THIS \$200 BILLION A YEAR SPENT ON  
14 ADVERTISING, IS ONE OF THE RESULTS OF THAT THAT THERE IS A  
15 LOT OF ADVERTISING OUT THERE?  
16 A. YES, I GUESS SO.  
17 Q. THAT'S THE ADVERTISING CLUTTER YOU DESCRIBED  
18 EARLIER?  
19 A. THAT'S CORRECT.  
20 MR. ESCHER: I'D LIKE TO HAVE THIS MARKED AS  
21 6265, YOUR HONOR.  
22 (DOCUMENT MORE PARTICULARLY  
23 LISTED IN THE INDEX MARKED  
24 FOR IDENTIFICATION DEFENDANTS'  
25 EXHIBIT # 6265)  
26 MR. ESCHER: IT'S ONE THAT SAYS "LIMITS OF  
27 MARKETING: ADVERTISING 'CLUTTER.'"   
28 Q. DOCTOR, I KNOW THIS IS A LITTLE HARD TO SEE.  
4381  
1 WHAT IS THIS DEMONSTRATIVE A PHOTOGRAPH OF?  
2 A. WELL, I APOLOGIZE. IT'S THE BEST I COULD COME UP  
3 WITH.  
4 THAT'S A PICTURE OF TIMES SQUARE IN NEW YORK, AND  
5 ALL OF THE ADVERTISING SIGNS THAT THERE ARE IN TIMES SQUARE.  
6 Q. OKAY. AND THAT JUST GOES TO SHOW THAT PEOPLE ARE  
7 EXPOSED TO MANY, MANY ADS, SOMETIMES ALL AT ONCE?  
8 A. I HAVE BEEN VERY CONSERVATIVE TO SAY EXPOSED TO  
9 HUNDREDS OF ADS. IN REALITY, IN SOME CASES IT'S THOUSANDS.  
10 Q. DOES THAT MEAN -- JUST BECAUSE YOU ADVERTISE, IT  
11 DOESN'T MEAN PEOPLE WILL PAY ATTENTION TO YOUR  
12 ADVERTISEMENTS?  
13 A. NO, IT DOESN'T MEAN THAT YOU BREAK THROUGH.  
14 I THINK THE IMPORTANT THING THAT IT DEMONSTRATES  
15 IS THAT THERE IS A FILTERING THAT PEOPLE USE OF ADVERTISING.  
16 Q. AND IS THIS ISSUE OF ADVERTISING CLUTTER  
17 SOMETHING THAT YOU TEACH TO YOUR STUDENTS?  
18 A. OH, YES.  
19 Q. AND DO YOU DEAL WITH THE ISSUE OF ADVERTISING  
20 CLUTTER IN YOUR CONSULTING WORK AS WELL?  
21 A. YES. AND IN THE WAY I DEAL WITH IT IS TO  
22 ADMONISH PEOPLE WHO ARE DOING ADVERTISING TO RECOGNIZE THAT  
23 ALL OF IT IS NOT GOING TO GO THROUGH ON A CLEAR CHANNEL.  
24 MR. ESCHER: WHY DON'T WE GET THE LIGHTS AGAIN.  
25 THE COURT: LET ME ASK THE JURY A QUESTION.  
26 IT'S 20 AFTER 11:00, JURORS.  
27 WE CAN DO TWO THINGS. WE CAN EITHER GO STRAIGHT

28 THROUGH TO 12:00 O'CLOCK WITHOUT A RECESS OR WE CAN TAKE A  
4382  
1 10-MINUTE RECESS.  
2 IS THERE ANYBODY THAT WOULD LIKE TO TAKE A  
3 10-MINUTE RECESS? WE ALL WANT TO GO STRAIGHT THROUGH.  
4 WE'LL JUST GO AHEAD TO 12:00.  
5 MS. CHABER: I NOTICE THE LAWYERS DIDN'T GET  
6 ASKED THAT QUESTION.  
7 THE COURT: DO YOU WANT A RECESS? IF YOU DO,  
8 WE'LL TAKE ONE.  
9 MS. CHABER: THAT'S ALL RIGHT. I'LL SURVIVE.  
10 MR. ESCHER: Q. GIVEN THIS ISSUE OF  
11 ADVERTISING CLUTTER, DOCTOR, WHY DO COMPANIES, INCLUDING  
12 CIGARETTE COMPANIES, SPEND SO MUCH MONEY ON ADVERTISING?  
13 A. I THINK THERE ARE THREE FUNDAMENTAL REASONS. ONE  
14 IS TO PROTECT THE BRAND. THE THOUGHT IS THAT "IF MY NAME IS  
15 NOT OUT THERE AND I STOP ADVERTISING, THE PEOPLE WHO  
16 REGULARLY BUY IT WILL FORGET ABOUT ME." SO IT'S  
17 REINFORCEMENT TO PEOPLE.  
18 THE SECOND IS THAT THERE IS THE ATTEMPT TO  
19 CAPTURE SALES FROM A COMPETING BRAND. AND REMEMBER THAT IN  
20 MANY PRODUCT CATEGORIES, 1 PERCENT MARKET SHARE SHIFT IS A  
21 LOT OF MONEY. SO, YOU KNOW, IT IS SOMEWHAT JUSTIFIED IN  
22 THAT SENSE. SO BOTH OF THOSE ARE CATEGORIES.  
23 THERE IS A THIRD ONE, WHICH IS TO SOME EXTENT A  
24 LITTLE BIT EMBARRASSING, BUT COMPANY ADVERTISING EXECUTIVES  
25 DO ADMIT IT WHEN YOU TALK TO THEM, AND THAT IS THAT THEY  
26 ADVERTISE BECAUSE THEY'RE AFRAID NOT TO. THEY ADVERTISE  
27 BECAUSE THEIR COMPETITORS ADVERTISE.  
28 AND IN FACT, IN THE ADVERTISING DISCIPLINE, THERE  
4383  
1 IS A CONCEPT CALLED COMPETITIVE PARITY, WHICH MEANS THAT NOT  
2 ONLY DO THEY ADVERTISE BECAUSE THEY'RE AFRAID NOT TO, THEY  
3 ADVERTISE IN AMOUNTS OR SIMILAR TO WHAT THEIR COMPETITORS  
4 SPEND.  
5 Q. NOW, DOCTOR, LOOKING BACK AT THE CHART ENTITLED  
6 "INPUTS FILTERED THROUGH THE BUYER'S CHARACTERISTICS IN THE  
7 BUYING DECISION PROCESS," WHICH WE HAD MARKED AS 6262,  
8 COMPARED TO ALL OF THESE OTHER FACTORS, IS THERE ANY  
9 GUARANTEE WHEN A COMPANY GOES OUT TO SPEND MONEY ON  
10 ADVERTISING THAT THE ADVERTISING IS GOING TO BE EFFECTIVE?  
11 A. NO, THERE IS NOT.  
12 Q. NOW, PROFESSOR, HAVE YOU SPECIFICALLY STUDIED THE  
13 IMPACT OF CIGARETTE MARKETING ON CONSUMERS?  
14 A. YES, I HAVE.  
15 Q. DO YOU HAVE A CHART THAT SUMMARIZES THE KIND OF  
16 EVIDENCE THAT YOU'VE REVIEWED?  
17 A. YES.  
18 MR. ESCHER: LET'S THAT ONE MARKED AS 6266.  
19 (DOCUMENT MORE PARTICULARLY  
20 LISTED IN THE INDEX MARKED  
21 FOR IDENTIFICATION DEFENDANTS'  
22 EXHIBIT # 6266)  
23 MR. ESCHER: YOUR HONOR, THIS IS THE ONE  
24 ENTITLED "EVIDENCE REGARDING THE INFLUENCES ON SMOKING  
25 BEHAVIOR."  
26 THE COURT: OKAY. IF YOU GIVE THAT TO ME, I'LL  
27 GIVE IT TO VERA.  
28 MR. ESCHER: THANK YOU, YOUR HONOR.  
4384  
1 Q. DOCTOR, IS THIS CHART ENTITLED "EVIDENCE  
2 REGARDING THE INFLUENCES ON SMOKING BEHAVIOR" THE CHART THAT  
3 YOU PREPARED?

4 A. YES, IT IS. IF I COULD --  
5 Q. IF YOU COULD COME DOWN.  
6 A. I CAN'T SIT IN THE CORNER AND LOOK AT THAT.  
7 Q. I APPRECIATE THAT.  
8 A. YES, THIS IS THE CHART THAT I PREPARED.  
9 Q. SO WHAT KIND OF EVIDENCE HAVE YOU REVIEWED IN  
10 ASSESSING THE IMPACT OF CIGARETTE MARKETING ON CONSUMERS?  
11 A. AS IT IS OUTLINED ON THIS CHART, FIRST, I LOOKED  
12 AT WHAT WE HAVE ALREADY BEEN DISCUSSING, CONSUMER BEHAVIOR.  
13 SECOND, I HAVE LOOKED AT THE VARIOUS PIECES OF  
14 RESEARCH THAT HAVE BEEN CONDUCTED BY THE GOVERNMENT,  
15 PARTICULARLY THE FEDERAL GOVERNMENT. I HAVE LOOKED AT  
16 BODIES OF SCIENTIFIC RESEARCH, MUCH OF IT WHICH HAS BEEN  
17 DONE IN THE ACADEMIC COMMUNITY.  
18 I HAVE LOOKED AT POLLING DATA, FOR INSTANCE, DATA  
19 THAT COMES FROM ORGANIZATIONS LIKE THE GALLUP ORGANIZATION.  
20 I HAVE LOOKED AT INFORMATION THAT HAS COME FROM VARIOUS  
21 SOURCES THAT DEAL WITH RISK-TAKING BEHAVIOR. I HAVE  
22 REVIEWED INFORMATION THAT HAS COME FROM VARIOUS SOURCES THAT  
23 DEAL WITH RACIAL AND ETHNIC DIFFERENCES.  
24 Q. DIFFERENCES IN SMOKING BEHAVIOR?  
25 A. THAT IS CORRECT. DIFFERENCES IN SMOKING BEHAVIOR  
26 THAT ARE RELATED TO THE RACIAL OR ETHNIC CHARACTERISTICS OF  
27 PERSONS.  
28 Q. OKAY.

4385  
1 A. I HAVE LOOKED AT WHAT HAS BEEN THE EFFECT  
2 PRODUCED IN COUNTRIES WHERE THERE HAS BEEN A BAN ON  
3 CIGARETTE ADVERTISING.  
4 AND THEN, FINALLY, I HAVE REVIEWED THE AREA WHICH  
5 I TEACH, CALLED INFORMATION PROCESSING.  
6 Q. WHAT IS INFORMATION PROCESSING?  
7 A. INFORMATION PROCESSING IS HOW INDIVIDUALS TAKE  
8 INFORMATION THAT IS PRESENTED TO THEM BY, FOR INSTANCE, A  
9 COMPANY, AND PROCESS IT THROUGH THOSE VARIOUS FILTERS TO  
10 REACH A CONCLUSION AS TO WHAT THAT MESSAGE SAYS TO THEM.  
11 Q. DOCTOR, YOU'RE NOT THE FIRST PERSON TO HAVE  
12 STUDIED THE SUBJECT OF WHAT INFLUENCES PEOPLE TO START OR  
13 CONTINUE SMOKING, ARE YOU?  
14 A. OH, NO.  
15 Q. HAS A LOT OF ACADEMIC AND GOVERNMENTAL TIME GONE  
16 INTO THAT ISSUE?  
17 A. YES, IT HAS.  
18 Q. OVER WHAT PERIOD OF TIME?  
19 A. AT LEAST 50 YEARS.  
20 Q. AT LEAST 50 YEARS?  
21 A. YES.  
22 Q. THAT'S 50 YEARS OF RESEARCH?  
23 A. YES.  
24 Q. 50 YEARS OF RESEARCH THAT YOU REVIEWED.  
25 WERE YOU ABLE TO FIND ANY BASIS FOR THE  
26 CONCLUSION THAT CIGARETTE ADVERTISING CAUSES PEOPLE TO START  
27 SMOKING?  
28 A. NONE WHATSOEVER. NONE.

4386  
1 Q. LET'S TURN TO THE FIRST ITEM, "CONSUMER  
2 BEHAVIOR."  
3 THAT'S ESSENTIALLY WHAT WE HAVE BEEN TALKING  
4 ABOUT SO FAR TODAY; IS THAT RIGHT?  
5 A. THAT'S CORRECT.  
6 Q. I THINK THAT MEANS WE SHOULD TURN TO THE SECOND  
7 ITEM, WHICH IS "GOVERNMENTAL RESEARCH."  
8 IF WE COULD GET THE LIGHTS AGAIN, PLEASE.



9           COULD YOU DESCRIBE FOR US WHAT KIND OF RESEARCH  
10 THE GOVERNMENT HAS CONDUCTED AND THAT YOU HAVE REVIEWED IN  
11 CONNECTION WITH THE SUBJECT OF WHAT CAUSES PEOPLE TO START  
12 SMOKING AND THE RELATIONSHIP BETWEEN CIGARETTE ADVERTISING  
13 AND CIGARETTE CONSUMPTION.

14           A.   YES.  THIS HAS BEEN -- THERE HAS BEEN GOVERNMENT  
15 RESEARCH THAT HAS BEEN CONDUCTED BY VARIOUS ORGANIZATIONS  
16 WITHIN THE FEDERAL GOVERNMENT, FOR EXAMPLE, THE DEPARTMENT  
17 OF HEALTH, EDUCATION AND WELFARE, BY THE FEDERAL TRADE  
18 COMMISSION, BY THE CENTER FOR DISEASE CONTROL.

19           THOSE ARE EXAMPLES OF ORGANIZATIONS IN THE  
20 FEDERAL GOVERNMENT WHO HAVE CONDUCTED RESEARCH ON THIS.

21           MR. ESCHER:  I'D LIKE TO MARK AN EXHIBIT FOR  
22 IDENTIFICATION.  AND THIS ONE HAS BEEN MARKED AS 5942.

23           THE COURT:  HAS THAT ALREADY BEEN MARKED?

24           MR. ESCHER:  IT'S PREMARKED, YOUR HONOR, IN THE  
25 GROUP OF MATERIALS THAT I HAVE.

26           SO IT SHOULD BE -- I'M GOING TO HAND YOU A COPY  
27 FOR YOUR CONVENIENCE.

28           THE COURT:  I THINK YOU JUST HANDED ME THIS.

4387

1           IT'S ALREADY IN THE BINDER?

2           MR. ESCHER:  I BELIEVE THAT IT IS, YOUR HONOR,  
3 ALTHOUGH I'M NOT SURE.

4           THE COURT:  OKAY.

5           MR. ESCHER:  5942.

6           THE COURT:  THANK YOU.

7                   (DOCUMENT MORE PARTICULARLY  
8                   LISTED IN THE INDEX MARKED  
9                   FOR IDENTIFICATION DEFENDANTS'  
10                  EXHIBIT # 5942)

11           MR. ESCHER:  Q.  DOCTOR, WHAT IS EXHIBIT 5942?

12           A.  THE TITLE OF THE EXHIBIT IS "TEENAGE SMOKING,  
13 NATIONAL PATTERNS OF CIGARETTE SMOKING AGES 12 THROUGH 18,  
14 1968 AND 1970."  IT WAS PRODUCED BY THE UNITED STATES  
15 DEPARTMENT OF HEALTH, EDUCATION AND WELFARE, THE PUBLIC  
16 HEALTH SERVICE.

17           Q.  AND LESLIE WHITELEY STARTED SMOKING IN 1972; IS  
18 THAT YOUR UNDERSTANDING?

19           A.  THAT'S MY UNDERSTANDING.  AT THE AGE OF 13, YES,  
20 1972.

21           Q.  AND THIS DEALT WITH NATIONAL PATTERNS OF  
22 CIGARETTE SMOKING, AGES 12 THROUGH 18, IN BOTH THE YEARS  
23 1968 AND 1970?

24           A.  THAT IS CORRECT.

25           Q.  AND DID YOU REVIEW THIS REPORT FROM THE U.S.  
26 DEPARTMENT OF HEALTH, EDUCATION AND WELFARE IN CONNECTION  
27 WITH DEVELOPING YOUR OPINION IN THIS CASE?

28           A.  YES, I DID.

4388

1           Q.  IS THIS ONE OF THE EARLIER REPORTS ON THE SUBJECT  
2 OF TEENAGE SMOKING?

3           A.  TO THE BEST OF MY KNOWLEDGE, IT IS, YES.

4           MR. ESCHER:  LET ME TURN TO MY NEXT DOCUMENT,  
5 YOUR HONOR.

6           Q.  MAYBE YOU COULD JUST TELL US A LITTLE BIT WHAT  
7 RESEARCHERS WERE INVESTIGATING IN CONNECTION WITH THIS  
8 REPORT.

9           MS. CHABER:  YOUR HONOR, I THINK WE ARE STARTING  
10 TO CALL FOR HEARSAY.

11           THE COURT:  I THINK WHAT HE'S ENTITLED TO DO IS  
12 TELL US THE SUBJECT MATTER OF THE REPORT.

13           LET ME JUST EXPLAIN TO THE DOCTOR WHAT THE LAW IS

14 HERE. IT'S A PROPER QUESTION, IF IT'S INTERPRETED  
15 PROPERLY.  
16 UNDER THE LAW, I THINK WHAT YOU ARE BEING ASKED  
17 IS THE GENERAL SUBJECT MATTER THAT'S BEING INVESTIGATED, NOT  
18 ANY SPECIFIC CONCLUSIONS THAT WERE REACHED AS A RESULT OF  
19 THE STUDY.  
20 AND SO YOU CAN TELL US THE GENERAL SUBJECT  
21 MATTER, WHAT WAS STUDIED, BUT YOU ARE NOT BEING ASKED AND  
22 UNDER THE LAW YOU CAN'T TELL US THE SPECIFIC RESULTS OF THE  
23 STUDY.  
24 ARE YOU WITH ME ON THAT?  
25 THE WITNESS: YES, I THINK I'M WITH YOU.  
26 I WILL BE VERY CAREFUL.  
27 MR. ESCHER: Q. IT'S A GENERAL QUESTION.  
28 A. I'LL BE TRY TO BE VERY CAREFUL ABOUT IT.

4389

1 THESE ARE TWO SAMPLES THAT WERE CONDUCTED, AS  
2 OBVIOUSLY, AS WE HAVE ALREADY SAID, IN 1968 AND 1970.  
3 AND THEY WERE INTERVIEWS WITH YOUNG PEOPLE, AGES  
4 12 TO 18 IN THOSE PERIODS OF TIME.  
5 AND OBVIOUSLY, THE OBJECTIVE OF THE STUDY IS  
6 CONTAINED IN THE TITLE OF THE WORK, WHICH IS: WHAT ARE THE  
7 PATTERNS OF CIGARETTE SMOKING AMONG THOSE YOUNG PEOPLE?  
8 Q. WAS THIS A LARGE, NATIONAL SURVEY?  
9 A. YES, IT WAS.  
10 Q. AND DID IT INVOLVE BOTH SMOKERS AND NONSMOKERS?  
11 A. YES, IT DID.  
12 MR. ESCHER: YOUR HONOR, I'D LIKE TO TURN NOW TO  
13 THE DOCUMENTS THAT HAVE BEEN MARKED AS DEFENDANTS' EXHIBIT  
14 5943.  
15 (DOCUMENT MORE PARTICULARLY  
16 LISTED IN THE INDEX MARKED  
17 FOR IDENTIFICATION DEFENDANTS'  
18 EXHIBIT # 5943)  
19 THE COURT: CAN I JUST ASK YOU, OVER THE NOON  
20 HOUR, IF YOU COULD JUST FIND OUT WHETHER THESE ARE IN THE  
21 BINDERS, AND IF NOT, TO PROVIDE A BINDER WITH THEM IN IT?  
22 IN JUST A QUICK LOOK, I DON'T SEE IT OVER THERE,  
23 BUT IT MAY BE THERE.  
24 MR. ESCHER: I WILL DO THAT, YOUR HONOR.  
25 THE COURT: JUST CHECK OVER NOON FOR ME.  
26 MR. ESCHER: YES.  
27 THE COURT: THANKS.  
28 MR. ESCHER: LET ME HAND YOU 5943, YOUR HONOR.

4390

1 THE COURT: THAT WILL INCLUDE THIS ONE TOO.  
2 MR. ESCHER: Q. DOCTOR, WHAT IS EXHIBIT 5943?  
3 A. THIS EXHIBIT IS ENTITLED "TEENAGER SMOKING,  
4 IMMEDIATE AND LONG-TERM PATTERNS."  
5 AND IT WAS PRODUCED BY THE NATIONAL INSTITUTE OF  
6 EDUCATION, WHICH IS A PART OF THE U.S. DEPARTMENT OF HEALTH,  
7 EDUCATION AND WELFARE, AND IT IS DATED NOVEMBER OF 1979.  
8 Q. DID YOU REVIEW THIS GOVERNMENTAL REPORT IN THE  
9 DEVELOPMENT OF YOUR OPINION IN THIS CASE?  
10 A. YES, I DID.  
11 Q. AND WAS THIS STUDY CONDUCTED IN A SIMILAR WAY TO  
12 THE ONE WE JUST LOOKED AT FROM '68 AND '70?  
13 A. YES, IT IS. IT IS A NATIONAL STUDY CONDUCTED BY  
14 THE NIE IN THE WINTER OF 1978 AND THE SPRING OF 1979.  
15 (DISCUSSION OFF THE RECORD)  
16 MS. CHABER: IS EVERYONE FREEZING?  
17 THE COURT: THAT'S WHAT I'M BEING TOLD.  
18 LET ME JUST SAY TO THE JURY, VERA SHOULD BE BACK

19 SHORTLY, BUT IF IT GETS TO BE TOO COLD AND YOU WANT TO TAKE  
20 A RECESS, JUST RAISE YOUR HANDS AND WE'LL TAKE A RECESS.

21 I DON'T WANT YOU TO BE UNCOMFORTABLE HERE. IF  
22 YOU ARE OKAY AND YOU CAN HANG ON, THAT'S FINE ALSO.

23 MR. ESCHER: Q. HAVE THERE BEEN OTHER REPORTS  
24 BY THE GOVERNMENT SINCE THESE FROM THE LATE 1960S AND LATE  
25 1970S?

26 A. YES, THERE HAVE.

27 Q. AND HAVE YOU REVIEWED THOSE REPORTS AS WELL TO  
28 DETERMINE WHICH FACTORS ARE ASSOCIATED WITH SMOKING

4391  
1 INITIATION BY MINORS?

2 A. YES, I HAVE.

3 Q. HAVE YOU PREPARED A CHART THAT IDENTIFIES FACTORS  
4 WHICH YOU CONSIDER TO BE ASSOCIATED WITH SMOKING INITIATION?

5 A. YES, I HAVE.

6 MR. ESCHER: YOUR HONOR, I'D LIKE TO HAVE THAT  
7 MARKED AS 6267.

8 (DOCUMENT MORE PARTICULARLY  
9 LISTED IN THE INDEX MARKED  
10 FOR IDENTIFICATION DEFENDANTS'  
11 EXHIBIT # 6267)

12 MR. ESCHER: IT'S ENTITLED "FACTORS ASSOCIATED  
13 WITH SMOKING INITIATION."

14 THE COURT: JUST SO I HAVE THIS RIGHT WHEN VERA  
15 COMES BACK, THESE TWO HAD BEEN PREVIOUSLY MARKED.

16 THE REPORTS, THESE ARE THE ONLY TWO THAT ARE  
17 NEWLY MARKED?

18 MR. ESCHER: I BELIEVE THAT'S RIGHT, YOUR HONOR,  
19 SO FAR.

20 THE COURT: OKAY.

21 MR. FURR: I'M TOLD, YOUR HONOR, THEY ARE IN  
22 BINDER 128.

23 THE COURT: 128. OKAY. I'M SURE IT'S OVER  
24 THERE. THANK YOU.

25 MR. ESCHER: IF WE COULD GET THE LIGHTS AGAIN,  
26 PLEASE.

27 Q. DOCTOR, DO YOU MIND COMING DOWN TO EXPLAIN THIS  
28 WITH YOUR POINTER, PLEASE.

4392  
1 A. SURE. THANK YOU.

2 AFTER HAVING REVIEWED ALL OF THE RESEARCH THAT WE  
3 HAVE JUST BEEN TALKING ABOUT -- AND IT GOES BEYOND THESE TWO  
4 (INDICATING) -- I COME AWAY WITH A CONCLUSION OF WHAT ARE  
5 THE FACTORS THAT ARE ASSOCIATED WITH THE INITIATION OR THE  
6 CONTINUANCE OF SMOKING.

7 THOSE THINGS -- FIRST OF ALL, THE MOST IMPORTANT  
8 ONE IS THE TOP ONE UP THERE, WHICH IS "PEER SMOKING," THAT  
9 IS, SMOKING AMONG THE FRIENDS, THE PEERS THAT ONE HAS, THE  
10 PEOPLE TO WHOM THEY HAVE ESTABLISHED SOME KIND OF SOCIAL  
11 RELATIONSHIP.

12 AND YOU BEGIN TO SEE THAT PEER SMOKING BECOMES  
13 EVEN MORE IMPORTANT AS PEOPLE DO HAVE A DEEPER SOCIAL  
14 RELATIONSHIP. FOR INSTANCE, "MY BOYFRIEND SMOKES, MY  
15 GIRLFRIEND SMOKES," AND SO FORTH.

16 THE SECOND OF THESE THAT I HAVE AN OPINION ON  
17 COMES OUT OF THAT RESEARCH. AND THAT IS THE ONE THAT DEALS  
18 WITH "PARENTAL SMOKING," THE AMOUNT OF SMOKING THAT IS GOING  
19 ON IN THE HOUSEHOLD AMONG PARENTS.

20 THE THIRD ONE IS "SIBLING SMOKING," AND  
21 PARTICULARLY -- I'M NOT VERY GOOD AT THIS (REFERRING TO  
22 LASER POINTER) -- IS "SIBLING SMOKING," AND PARTICULARLY, IT  
23 IS ELDER SIBLINGS, YOUR OLDER BROTHER AND SISTER.

24 ANOTHER FACTOR THAT IS ASSOCIATED WITH IT THAT I  
25 COME AWAY WITH AN OPINION ON IS THAT IT IS THE SHEER ACCESS  
26 TO CIGARETTES, THE ABILITY TO OBTAIN THE CIGARETTES.  
27 THERE IS RISK-TAKING. THERE IS A RELATIONSHIP  
28 THAT WE SEE BETWEEN THE ENGAGING IN DIFFERENT KINDS OF  
4393  
1 RISK-TAKING BEHAVIOR AND CIGARETTE SMOKING. WE ALSO SEE  
2 THAT THERE IS A RELATIONSHIP.  
3 AND I COME TO THE CONCLUSION THAT THERE IS --  
4 FROM NOT ONLY THIS, BUT OTHER RESEARCH -- THAT THERE IS ROLE  
5 MODEL SMOKING. AND IN PARTICULAR, THE SMOKING BY TEACHERS  
6 AMONG -- FOR YOUNG PEOPLE.  
7 IT IS THE ATTITUDE IN THE HOME, IF THERE IS MORE  
8 OF AN ACCEPTANCE, A PARENTAL ACCEPTANCE IN THE HOME.  
9 Q. IS THAT WHAT YOU ARE TALKING ABOUT, "PARENTAL  
10 ATTITUDE" NOW?  
11 A. THAT'S "PARENTAL ATTITUDE."  
12 AN EXAMPLE WOULD BE MY OWN PARENTS IN MY HOME. I  
13 SMOKED AT A YOUNG AGE. I DON'T SMOKE ANYMORE. I SMOKED --  
14 Q. DOCTOR, YOU SHOULD SLOW DOWN.  
15 A. I SMOKED AT A YOUNG AGE SIMPLY BECAUSE NOT  
16 ONLY DID MY PARENTS SMOKE, BUT MY PARENTS WERE VERY LENIENT  
17 WITH -- ABOUT THE IDEA THAT I WOULD SMOKE. THEY DIDN'T  
18 OBJECT TO IT.  
19 THE SOCIOECONOMIC STATUS OF THE PERSON HAS AN  
20 IMPACT. DO THEY HAVE THE MONEY TO BE ABLE TO AFFORD  
21 CIGARETTES?  
22 I COME AWAY FROM THE STUDIES, COMING TO RECOGNIZE  
23 THAT THERE IS AN ASSOCIATION BETWEEN SINGLE-PARENT FAMILIES  
24 AND SMOKING MORE THAN THERE IS WHEN THERE ARE BOTH PARENTS  
25 PRESENT.  
26 THERE IS A RELATIONSHIP BETWEEN SMOKING  
27 INITIATION AND CONTINUANCE AND ACADEMIC ACHIEVEMENT.  
28 THERE IS ONE ABOUT "SELF-ESTEEM." HOW DO I VIEW  
4394  
1 MYSELF?  
2 AND SO I COME AWAY WITH AN OPINION THAT THOSE  
3 PEOPLE WHO HAVE A LOWER SELF-ESTEEM TEND MORE TO BE A  
4 SMOKER.  
5 AND BY THE WAY, ON "ACADEMIC ACHIEVEMENT," THE  
6 SAME IS TRUE, THAT SMOKERS TEND TO HAVE A LOWER LEVEL OF  
7 ACADEMIC ACHIEVEMENT.  
8 ALSO, THAT THERE IS THIS IDEA THAT PEOPLE  
9 INITIATE SMOKING -- AND WE SEE IT IN ALL OF THE REPORTS --  
10 THAT IT'S THE APPEARING TO GROW UP. "I WANT TO BE -- I WANT  
11 TO LOOK MORE GROWN-UP." AND IN FACT, WE ALSO SEE THAT  
12 PEOPLE HAVE A CURIOSITY ABOUT SMOKING. "I'M CURIOUS ABOUT  
13 THAT."  
14 WE ALSO KNOW THAT SOCIAL SITUATIONS -- I'M OUT  
15 WITH A GROUP OF OTHER KIDS AND I'M GOING TO ATTEMPT TO SMOKE  
16 IF ALL OF THEM ARE SMOKING. IT'S AN ACCEPTABLE SOCIAL  
17 SITUATION.  
18 OR WE ARE AT SOME KIND OF A PARTY OR DANCE AND  
19 SMOKING GOES ON. THE TENDENCY IS GOING TO BE MORE  
20 ASSOCIATED WITH PEOPLE WHO SMOKE.  
21 ALSO, RELIEVING STRESS AND NERVOUSNESS HAS BEEN  
22 CITED. AND I AGREE WITH THAT, GIVEN THE DATA I'VE SEEN.  
23 AND THEN FINALLY, THERE IS SHEER REBELLIOUSNESS.  
24 "I'M GOING TO REBEL AGAINST THE SYSTEM AND SMOKE."  
25 Q. NOW, AS YOU INDICATED EARLIER, YOU HAVE REVIEWED  
26 THE DEPOSITIONS OF LESLIE WHITELEY AND HER FAMILY MEMBERS;  
27 CORRECT?  
28 A. THAT IS CORRECT.

4395

1 Q. LET'S GO THROUGH THESE FACTORS ASSOCIATED WITH  
2 SMOKING INITIATION, AND TALK ABOUT THEM IN CONNECTION WITH  
3 WHAT YOU KNOW ABOUT LESLIE WHITELEY FROM THE EVIDENCE YOU  
4 HAVE REVIEWED.

5 DO YOU SEE ANY INFLUENCE OF PEERS ON LESLIE  
6 WHITELEY'S SMOKING INITIATION?

7 A. YES. MY RECALL OF HER DEPOSITION IS SPECIFICALLY  
8 THAT MRS. WHITELEY HAD HER FIRST CIGARETTE AT THE SAME TIME  
9 WITH A 13-YEAR-OLD COMPANION, A YOUNG WOMAN WHO WAS HER  
10 NEIGHBOR.

11 SO THERE WAS PEER SMOKING THAT OCCURRED THERE.  
12 AND THEN SHE ALSO REPORTS THAT SHE SMOKED IN GROUPS WITH  
13 OTHER YOUNG PEOPLE.

14 Q. WOULD YOU SAY THAT THAT SORT OF PEER SMOKING IS  
15 TYPICAL OF YOUNG SMOKERS?

16 A. YES, IT IS, VERY MUCH. IT IS A STRONGER FACTOR,  
17 WE SEE, ASSOCIATED IN RESEARCH LITERATURE WITH SMOKING.

18 Q. ANOTHER WAY OF LOOKING AT IT IS TO SAY THAT IF  
19 YOUR FRIENDS ARE SMOKERS, YOU ARE MORE LIKELY TO SMOKE?

20 A. THAT'S CORRECT. AND EVEN MORE SO, IF IT'S  
21 YOUR -- SOMEBODY WHO YOU HAVE A CLOSE SOCIAL RELATIONSHIP  
22 WITH, A BOYFRIEND/GIRLFRIEND.

23 Q. SO THE BOYFRIEND/GIRLFRIEND RELATIONSHIP IS EVEN  
24 MORE POWERFUL AS A FACTOR IN DESCRIBING SMOKING INITIATION;  
25 IS THAT RIGHT?

26 A. THAT'S CORRECT.

27 Q. WHAT ABOUT "PARENTAL SMOKING"; WHAT WAS YOUR  
28 UNDERSTANDING OF THE EVIDENCE ABOUT THAT IN CONNECTION WITH

4396

1 LESLIE WHITELEY?

2 A. MY RECOLLECTION OF MRS. WHITELEY'S DEPOSITION IS  
3 THAT HER PARENTS DID NOT SMOKE WHEN SHE WAS A YOUNG WOMAN IN  
4 THE HOUSEHOLD.

5 HOWEVER, SHE DID KNOW THAT BOTH OF HER PARENTS  
6 HAD AT ONE TIME SMOKED.

7 Q. AND DID YOU SEE ANY EVIDENCE THAT LESLIE WHITELEY  
8 REMEMBERS SEEING CIGARETTES IN THE HOME?

9 A. YES, SHE DOES RECALL THAT.

10 Q. WHAT ABOUT "SIBLING SMOKING"; DID YOU SEE THAT AS  
11 A FACTOR IN CONNECTION WITH LESLIE WHITELEY?

12 A. YES. IN FACT, HER OLDER SISTER SMOKED.

13 Q. AND IS IT YOUR UNDERSTANDING THAT THE ELDER  
14 SIBLINGS' SMOKING COORDINATES STRONGLY WITH SMOKING  
15 INITIATION IN MINORS?

16 A. YES. THERE IS RESEARCH DATA THAT UNDERPINS THAT  
17 OPINION OF MINE THAT HAD BEEN STUDIED, THAT ONE OF THE  
18 FACTORS THAT IS STRONGLY ASSOCIATED WITH SMOKING INITIATION  
19 AND CONTINUING AMONG ADOLESCENTS IS THE FACT THAT THEIR  
20 OLDER SIBLINGS SMOKED; OLDER BROTHER, OLDER SISTER.

21 Q. WHAT ABOUT "ACCESS TO CIGARETTES"; WHAT WAS YOUR  
22 UNDERSTANDING AS TO HOW THAT FACTOR INFLUENCED LESLIE  
23 WHITELEY?

24 A. I RECALL MRS. WHITELEY SAYING IN HER DEPOSITION  
25 THAT THE ACCESS TO CIGARETTES WAS THERE.

26 AND IN FACT, IT HAD BEEN -- SHE GOT CIGARETTES --  
27 SHE AND HER 13-YEAR-OLD FRIEND GOT CIGARETTES FROM A  
28 12-YEAR-OLD NEIGHBORHOOD CHILD, WHO HAD OBTAINED ACCESS --

4397

1 MAYBE NOT LEGALLY, BUT HAD OBTAINED ACCESS FROM HER  
2 GRANDMOTHER.

3 Q. WHAT ABOUT "RISK TAKING"; HOW DID THAT FACTOR  
4 INTO LESLIE WHITELEY'S DECISION TO START SMOKING?

5 A. I DON'T KNOW WHETHER IT IS WITH HER INITIATION,  
6 MEANING HER FIRST CIGARETTE, BUT EARLY ON, WE SEE THAT  
7 MRS. WHITELEY WAS ENGAGING IN VARIOUS RISK-TAKING BEHAVIOR.  
8 Q. THAT WOULD INCLUDE MOTORCYCLE RIDING?  
9 A. MOTORCYCLES, HAVING A RELATIONSHIP WITH A PERSON  
10 WHO SHE DESCRIBES AS A BIKER, AND OTHER THINGS.  
11 Q. AND OTHER THINGS INCLUDING DRUG ABUSE; RIGHT?  
12 A. MY UNDERSTANDING IS THAT MRS. WHITELEY WAS NOT  
13 ONLY -- AT LEAST, THERE'S SOME INDICATION OF ALCOHOL ABUSE,  
14 BUT DRUG ABUSE, YES.  
15 Q. WHAT ABOUT "ROLE MODEL SMOKING"; DO YOU SEE THAT  
16 AS A FACTOR IN CONNECTION WITH LESLIE WHITELEY?  
17 A. MRS. WHITELEY DOES REPORT THAT HER TEACHER SMOKED  
18 AND THAT SHE NOTICED IT. AND THAT IS SO COMMON.  
19 WE ARE BEGINNING TO SEE -- THERE'S A LOT OF  
20 EVIDENCE OF THAT, OF THE PERCEPTION THAT "MY TEACHER IS  
21 SMOKING," WHICH IS A VERY IMPORTANT ROLE MODEL TO YOUNG  
22 ADOLESCENTS.  
23 Q. SO THERE IS A STRONG CORRELATION BETWEEN THE  
24 PERCEPTION OF TEACHERS SMOKING AND SMOKING INITIATION BY  
25 MINORS; IS THAT RIGHT?  
26 A. THAT IS CORRECT.  
27 Q. THERE WAS TESTIMONY IN LESLIE WHITELEY'S  
28 DEPOSITION ABOUT HER BEING AWARE OF TEACHERS SMOKING IN THE  
4398 LOUNGE, IN THE FACULTY LOUNGE, AND SMOKE BILLOWING OUT OF  
1 THE ROOM?  
2 A. YES, COMING OUT THE DOOR.  
3 Q. A PRETTY VIVID RECOLLECTION, ISN'T IT?  
4 A. YES, IT IS.  
5 Q. WHAT ABOUT "PARENTAL ATTITUDES"; HOW DOES THAT  
6 AFFECT SMOKING INITIATION IN CONNECTION WITH LESLIE  
7 WHITELEY?  
8 A. IN CONNECTION WITH LESLIE WHITELEY, APPARENTLY,  
9 HER PARENTS, WHILE THEY WERE NOT ACTIVE SMOKERS AT THE TIME,  
10 DID NOT DISCUSS WITH HER OR BRING TO HER ATTENTION ANY OF  
11 THE HEALTH RISKS, AND SEEMED TO BE CONDONING THE FACT THAT  
12 SHE COULD SMOKE IN THE HOME.  
13 Q. WAS THERE ALSO SOME CONTRARY EVIDENCE IN THE  
14 RECORD, INDICATING THAT EITHER MR. OR MRS. WHITTEKER WERE  
15 VERY ANTISMOKING?  
16 A. WHITTEKER?  
17 Q. WHITTEKER IS HER MAIDEN NAME.  
18 A. I'M SORRY. I DIDN'T REMEMBER THE MAIDEN NAME.  
19 I KIND OF RECALL -- I DON'T HAVE A PERFECT RECALL  
20 ON THAT. I'M SORRY.  
21 Q. WHAT ABOUT "SOCIOECONOMIC STATUS"; DO YOU SEE  
22 THAT CUTTING ONE WAY OR ANOTHER IN CONNECTION WITH LESLIE  
23 WHITELEY?  
24 A. NO.  
25 Q. AND "SINGLE-PARENT FAMILIES"; THAT'S NOT A FACTOR  
26 WITH HER EITHER, IS IT?  
27 A. NO, IT IS NOT.  
28  
4399 Q. AND "ACADEMIC ACHIEVEMENT"; HOW DOES THAT FACTOR  
1 IN AS FAR AS LESLIE WHITELEY IS CONCERNED, IN YOUR OPINION?  
2 A. WELL, THE ONLY THING THAT I CAN SEE IN THE  
3 DEPOSITION FROM HER IS THAT SHE WAS ON A KIND OF ACCELERATED  
4 ACADEMIC PROGRAM, WANTING TO GET OUT OF SCHOOL.  
5 AND MY RECALL IS THAT THE REASON WHY SHE WAS ON  
6 THE ACCELERATED PROGRAM WAS EXACTLY THAT SHE WANTED TO GET  
7 OUT OF SCHOOL. SHE WANTED TO GET IT OVER WITH.  
8 Q. SHE DIDN'T HAVE ANY SPECIAL INTEREST IN ACADEMIC  
9

10 ISSUES?  
11 A. NOT THAT I CAN SEE ANYWHERE IN HER DEPOSITION.  
12 Q. WHAT ABOUT SELF-ESTEEM; DO YOU HAVE ENOUGH  
13 EVIDENCE FROM THE DEPOSITION YOU REVIEWED TO OPINE ONE WAY  
14 OR THE OTHER AS TO HOW THAT MIGHT HAVE AFFECTED LESLIE  
15 WHITELEY?  
16 A. NO, NOT REALLY.  
17 Q. AND HOW ABOUT THE NEXT ONE, "TO APPEAR GROWN UP";  
18 DID YOU SEE THAT AS A FACTOR IN CONNECTION WITH THE  
19 MATERIALS YOU REVIEWED ABOUT LESLIE WHITELEY?  
20 A. IT OCCURRED IN BOTH -- BOTH IN THE INITIATION,  
21 BUT MORE SO AT THE AGE OF 15, WHEN SHE WANTED TO "LOOK  
22 TOUGH."  
23 Q. AND SHE ALSO TESTIFIED IN HER DEPOSITION THAT SHE  
24 VIEWED THE SMOKING INITIATION AS A RITE OF PASSAGE?  
25 A. THAT IS CORRECT.  
26 Q. AND THAT SHE WANTED TO LOOK GROWN-UP?  
27 A. YES.  
28 Q. AND ISN'T IT YOUR UNDERSTANDING THAT SHE LEFT

4400

1 HOME AT AGE 16 TO GET MARRIED AND MOVE TO VIRGINIA?  
2 A. YES. AS I RECALL, SHE GOT MARRIED AT THE AGE OF  
3 16, AND HER HUSBAND WAS IN THE UNITED STATES NAVY.  
4 Q. WHAT ABOUT "CURIOSITY"; DO YOU SEE THAT AS A  
5 FACTOR THAT'S APPLICABLE IN THE CONTEXT OF LESLIE WHITELEY'S  
6 SMOKING INITIATION?  
7 A. SPECIFICALLY, MRS. WHITELEY DOES SAY THAT THE  
8 REASON SHE INITIATED SMOKING WAS OUT OF CURIOSITY ABOUT  
9 CIGARETTES.  
10 Q. AND HOW ABOUT THE FACTOR OF "SOCIAL SITUATIONS";  
11 DO YOU SEE THAT AS RELATED TO LESLIE WHITELEY OR DO YOU HAVE  
12 ENOUGH INFORMATION ON THAT?  
13 A. SHE AT LEAST DESCRIBES HAVING BEEN IN SOME  
14 SITUATIONS WITH OTHER KIDS ON THE BLOCK WHERE THERE WERE  
15 SOCIAL SITUATIONS WHEN THEY WERE ALL SMOKING.  
16 Q. HOW ABOUT TO "RELIEVE STRESS OR NERVOUSNESS"; DO  
17 YOU SEE THAT IN CONNECTION WITH THE MATERIAL YOU REVIEWED  
18 REGARDING LESLIE WHITELEY?  
19 A. NO, I DON'T REALLY. I DON'T SEE ANYTHING ABOUT  
20 STRESS OR NERVOUSNESS IN ANY OF THE THINGS SHE SAID.  
21 Q. THE LAST ONE ON YOUR LIST THERE IS  
22 "REBELLIOUSNESS"?  
23 A. YES.  
24 Q. DO YOU SEE THAT IN CONNECTION WITH LESLIE  
25 WHITELEY'S SMOKING INITIATION?  
26 A. WELL, WHETHER IT'S WITH THE INITIATION, I THINK  
27 IT'S MORE SO WHAT WE DESCRIBED BEFORE, THE CONTINUANCE AND  
28 CHANGE IN HER BEHAVIOR.

4401

1 FOR INSTANCE, THE BRAND OF CIGARETTES SHE SMOKED  
2 AT THE AGE OF 15, WHERE SHE HAD THIS REBELLIOUSNESS AND SHE  
3 WAS INTERESTED IN MOTORCYCLES, BIKERS AND THINGS OF THAT  
4 SORT.  
5 IT'S THE KIND OF REBELLIOUSNESS THAT OCCURRED AT  
6 THAT AGE.  
7 Q. YOU VIEW THAT AS SORT OF REBELLIOUSNESS, THE  
8 INTEREST IN MOTORCYCLES, WANTING TO LOOK TOUGH, SMOKING THE  
9 UNFILTERED CIGARETTES?  
10 A. I WOULD, YES.  
11 Q. YOU ARE NOT SAYING, ARE YOU, THAT ALL OF THESE  
12 FACTORS HAVE TO BE PRESENT FOR SOMEBODY TO START SMOKING, DO  
13 YOU?  
14 A. OH, NO.

15 Q. THESE FACTORS ARE GOING TO VARY FROM PERSON TO  
16 PERSON, AREN'T THEY?  
17 A. ABSOLUTELY. AS WE HAVE JUST ILLUSTRATED, SOME OF  
18 THOSE ARE NOT APPLICABLE IN THE CASE OF MRS. WHITELEY.  
19 Q. ALL RIGHT. BUT THERE ARE ONES WITH RESPECT TO  
20 MRS. WHITELEY WHERE SHE HERSELF ARTICULATED ONE OF THESE  
21 FACTORS AS A REASON FOR HER SMOKING; ISN'T THAT RIGHT?  
22 A. THAT IS CORRECT. AND SPECIFICALLY, SHE SAYS  
23 "CURIOSITY."  
24 Q. SHE SPECIFICALLY SAID "PEER PRESSURE" TOO;  
25 DOESN'T SHE?  
26 A. YES, SHE DID.  
27 Q. SHE SPECIFICALLY SAID SOMETHING THAT RELATES TO  
28 "ROLE MODEL SMOKING"; THAT IS, THE TEACHERS?  
4402  
1 A. THAT IS CORRECT.  
2 Q. AND OKAY. WHY DON'T YOU TAKE A SEAT NOW.  
3 A. THANK YOU.  
4 THE COURT: DO YOU WANT THE LIGHTS BACK ON?  
5 MR. ESCHER: YES, PLEASE.  
6 Q. SIR, ON THE LIST THAT WE JUST LOOKED AT, YOU  
7 DIDN'T HAVE ADVERTISING, DID YOU?  
8 A. NO, I DID NOT.  
9 Q. WHY NOT?  
10 A. THERE IS NO EVIDENCE THAT I HAVE SEEN FROM ANY  
11 RESEARCH THAT HAS INDICATED THAT ADVERTISING IS RELATED TO  
12 THE INITIATION OR CONTINUANCE OF THE USE OF CIGARETTES IN  
13 SMOKING.  
14 Q. NOW, OUR GOVERNMENT HAS SPECIFICALLY EXAMINED  
15 THAT QUESTION, HAVEN'T THEY, ABOUT THE IMPACT OF CIGARETTE  
16 ADVERTISING ON SMOKING?  
17 A. YES.  
18 MR. ESCHER: LET ME GET THE NEXT IN ORDER HERE.  
19 YOUR HONOR, THIS ONE HAS BEEN MARKED AS EXHIBIT  
20 5959 AND IT'S IN BINDER 129.  
21 I WILL PROVIDE YOU WITH A COURTESY COPY.  
22 THE COURT: THANK YOU.  
23 (DOCUMENT MORE PARTICULARLY  
24 LISTED IN THE INDEX MARKED  
25 FOR IDENTIFICATION DEFENDANTS'  
26 EXHIBIT # 5959)  
27 MR. ESCHER: Q. DR. MARTIN, WHAT IS DEFENDANTS'  
28 EXHIBIT 5959?  
4403  
1 A. THIS IS A PART OF THE ECONOMIC REPORT OF THE  
2 PRESIDENT OF THE UNITED STATES, AS TRANSMITTED TO THE  
3 CONGRESS IN JANUARY OF 1987. IT CAME IN TOGETHER WITH THE  
4 ANNUAL REPORT OF THE COUNCIL OF ECONOMIC ADVISERS, AND WAS  
5 PRINTED IN 1987 BY THE UNITED STATES GOVERNMENT PRINTING  
6 OFFICE.  
7 Q. AND DOES THIS REPORT ADDRESS THE SUBJECT OF THE  
8 ROLE OF CIGARETTE ADVERTISING IN DETERMINING THE AMOUNT OF  
9 CIGARETTE CONSUMPTION?  
10 A. THE REPORT SPECIFICALLY ADDRESSES IT. CHAPTER 6  
11 IS ENTITLED "RISK AND RESPONSIBILITY."  
12 Q. DOCTOR, IS THIS ONE OF THE GOVERNMENTAL REPORTS  
13 THAT YOU REVIEWED IN CONNECTION WITH THE DEVELOPMENT OF YOUR  
14 OPINION IN THIS CASE?  
15 A. YES, IT IS.  
16 THE COURT: I THINK THIS IS GETTING TO A LOGICAL  
17 POINT. THIS HAS BEEN A LONG SESSION.  
18 MR. ESCHER: THAT'S FINE, YOUR HONOR.  
19 THE COURT: JURORS, LET ME GIVE YOU AN EXTRA



20 FIVE MINUTES FOR LUNCH, BECAUSE WE HAVE HAD A LONG SEGMENT.  
21 PLEASE CONTINUE TO FOLLOW THE ADMONITION DURING  
22 THE NOON HOUR, AND WE'LL SEE YOU BACK AT 1:30.  
23 (LUNCH RECESS TAKEN AT 11:53 A.M.)  
24  
25  
26  
27  
28

4404

1 AFTERNOON SESSION 1:45 P.M.  
2 FRIDAY, FEBRUARY 25, 2000  
3 (THE FOLLOWING PROCEEDINGS WERE HELD IN  
4 CHAMBERS, OUTSIDE THE PRESENCE OF THE JURY)  
5 THE COURT: WE ARE ON THE RECORD IN CHAMBERS.  
6 COUNSEL FOR PHILIP MORRIS JUST HANDED THE COURT A  
7 NOTE.  
8 MS. MASON IS REPORTING THAT SHE WAS HANDED THIS  
9 NOTE BY JUROR NO. 12, MS. WILSON, AGAINST HER PROTESTATION  
10 THAT ANY NOTES SHOULD BE GIVEN TO VERA MU, THE COURT CLERK,  
11 AS OPPOSED TO BEING GIVEN TO HER.  
12 BUT THIS JUROR, IN EFFECT, FORCED THE NOTE ON  
13 HER; IS THAT CORRECT?  
14 MS. MASON: IT IS, YOUR HONOR.  
15 THE COURT: HERE IS WHAT THE NOTE SAYS:  
16 "TO ATTORNEY L.E. MASON:  
17 "YOU MADE SOME IMPACT" -- WITH THOSE WORDS  
18 UNDERLINED -- "SOME IMPACT ON A YOUNG MAN  
19 (SITTING NEXT TO ME) WHEN YOU WENT BY TOWARD THE  
20 COURTROOM!!! "HE WAS SPEAKING IN SPANISH, WHICH  
21 I UNDERSTOOD...)"  
22 AND THEN IT HAS THE TIME AND THE DATE, AND IT  
23 SAYS: "SORRY: CANNOT SIGN THIS NOTE."  
24 SO I TAKE IT, AFTER A DISCUSSION WITH COUNSEL, I  
25 HAVE A STIPULATION THAT I SHOULD CALL MS. WILSON IN AT THIS  
26 POINT.  
27 I WILL TELL HER THAT MS. MASON WAS REQUIRED TO  
28 GIVE ME THIS NOTE. UNDER THE LAW, SHE HAD NO CHOICE ABOUT

4405

1 IT. I WILL ASK WHO THE PERSON WAS THAT SHE IS REFERENCING  
2 IN THIS NOTE. IF IT TURNS OUT TO HAVE BEEN A JUROR, THEN I  
3 WILL ASK HER WHAT THAT JUROR SAID IN SPANISH.  
4 IF IT WAS NOT A JUROR WHO SAID THAT, THEN ALL THE  
5 PARTIES ARE REQUESTING THAT THE COURT NOT ASK ABOUT THE  
6 CONTENTS OF THE COMMUNICATION, OTHER THAN TO ASSURE US THAT  
7 THIS JUROR WILL CONTINUE TO BE A COMPLETELY FAIR AND  
8 IMPARTIAL JUROR, REGARDLESS OF WHAT MAY HAVE BEEN SAID.  
9 AND I WILL OBVIOUSLY ADMONISH THIS PERSON AGAINST  
10 ANY FURTHER COMMUNICATIONS DIRECTLY WITH COUNSEL.  
11 DO YOU ALL STIPULATE THAT IS WHAT THE COURT  
12 SHOULD DO?  
13 MR. FURR: YES.  
14 MR. ESCHER: JUST ONE CLARIFICATION, YOUR HONOR,  
15 THAT IT WILL BE A JUROR IN THIS CASE, BECAUSE IT COULD  
16 WELL BE -- THE PERSON WHO SPOKE IN SPANISH COULD WELL BE A  
17 JUROR IN SOME OTHER CASE UP AND DOWN THIS HALL.  
18 THE COURT: I WAS OBVIOUSLY REFERRING TO THIS  
19 CASE.  
20 WITH THAT CLARIFICATION, DO YOU ALL SO STIPULATE  
21 THAT THE COURT SHOULD DO THAT?  
22 MS. CHABER: YES.  
23 MR. FURR: YES.  
24 MR. ROSSE: YES.

25 MS. MASON: YES.  
26 (DISCUSSION OFF THE RECORD)  
27 THE COURT: WE ARE ON THE RECORD FOR ANOTHER  
28 PURPOSE, BEFORE WE CALL MS. WILSON IN.  
4406  
1 AND THAT IS THE PLAINTIFF, MS. CHABER, HAS  
2 REQUESTED THAT AT THE END OF THE DAY, THE COURT READ THE  
3 FOLLOWING STATEMENT TO THE JURY. IT READS LIKE THIS:  
4 "PLAINTIFF LESLIE WHITELEY WILL BE UNABLE TO  
5 RETURN TO THE COURTROOM DUE TO HER HEALTH  
6 CONDITION. YOU MUST NOT HOLD THAT FACT AGAINST  
7 ANY PARTY IN DECIDING THIS CASE."  
8 WE ARE PUTTING ON THE RECORD WHAT WAS DISCUSSED  
9 OFF THE RECORD. I TAKE IT THAT THAT IS YOUR REQUEST, THAT I  
10 READ THAT STATEMENT FOR THE JURY?  
11 MS. CHABER: YES, YOUR HONOR.  
12 THE COURT: AND AS I UNDERSTAND IT, WITH THE  
13 UNDERSTANDING THAT NO ONE IS GIVING UP ANY RIGHT WITH  
14 RESPECT TO ANY PENDING MOTION FOR A MISTRIAL, AND THIS IS  
15 NOT DEEMED TO BE ANY WAIVER OF ANY POSITION ASSERTED ON ANY  
16 PENDING MOTION FOR A MISTRIAL, THAT NONE OF THE DEFENDANTS  
17 HAVE ANY OBJECTION TO THE COURT READING THIS STATEMENT. IS  
18 THAT CORRECT?  
19 MR. HARDY: THAT'S CORRECT, YOUR HONOR.  
20 MR. FURR: THAT'S CORRECT, YOUR HONOR.  
21 MR. ROSSE: CORRECT.  
22 THE COURT: SO I WILL DO THAT.  
23 WILL YOU DO THIS. RATHER THAN MY BEING A  
24 SELF-STARTER IN PULLING THIS OUT IN FRONT OF THE JURY, DO  
25 YOU MIND SAYING IN FRONT OF THE JURY AT THE END OF THE DAY:  
26 "WOULD THE COURT PLEASE READ TO THE JURY THE STATEMENT THAT  
27 WE HAVE REQUESTED"? IS THERE ANY OBJECTION TO THAT?  
28 MR. HARDY: NO, THERE IS NO OBJECTION TO THAT.  
4407  
1 THE COURT: WILL YOU DO THAT, AND TAKE THE  
2 RESPONSIBILITY OF TRIGGERING THE READING OF THIS?  
3 (DISCUSSION OFF THE RECORD).  
4 THE COURT: IS THE ANSWER THAT YOU WILL  
5 UNDERTAKE THE RESPONSIBILITY OF REMINDING ME?  
6 MS. CHABER: YES, YOUR HONOR.  
7 THE COURT: OKAY. OFF THE RECORD.  
8 (DISCUSSION OFF THE RECORD)  
9 (MS. WILSON ENTERS THE CHAMBERS AREA)  
10 THE CLERK: HAVE A SEAT.  
11 THE COURT: COME ON IN, MS. WILSON. HAVE A  
12 SEAT.  
13 JUROR NO. 12: DID I DO SOMETHING AWFUL?  
14 THE COURT: WELL, LET ME SAY I DON'T SAY YOU DID  
15 SOMETHING AWFUL, BUT I WILL TALK TO YOU IN A MINUTE ABOUT  
16 WHAT YOU DID DO.  
17 BUT I WANT TO FIND OUT THE FACTS BEFORE WE GET TO  
18 THAT.  
19 JUROR NO. 12: OKAY. I UNDERSTAND.  
20 THE COURT: THE FIRST THING I WANT TO SAY TO YOU  
21 IS, MS. MASON HAD TO GIVE ME THIS NOTE. UNDER THE LAW, SHE  
22 HAD NO CHOICE ABOUT IT.  
23 JUROR NO. 12: I MADE A GOOF. I AGREE.  
24 THE COURT: DON'T HOLD IT AGAINST HER.  
25 JUROR NO. 12: NO. NO. NO.  
26 THE COURT: LET ME JUST TALK, PLEASE.  
27 JUROR NO. 12: YES. YES, YOUR HONOR.  
28 THE COURT: I JUST WANT TO BE COMFORTABLE THAT  
4408

1 YOU WON'T HOLD IT AGAINST HER, BECAUSE YOU NEED TO  
2 UNDERSTAND THAT UNDER THE LAW, SHE HAD TO GIVE ME THIS  
3 NOTE. OKAY?

4 JUROR NO. 12: I WAS VERY SORRY AS SOON AS I DID  
5 IT. IT'S JUST THAT IT WAS SO FUNNY WHEN IT HAPPENED. HE  
6 DIDN'T KNOW I UNDERSTOOD SPANISH.

7 THE COURT: OKAY. LET ME JUST ASK YOU A COUPLE  
8 OF QUESTIONS.

9 THE PERSON THAT WAS SPEAKING IN SPANISH, IS THAT  
10 A JUROR IN THIS CASE?

11 JUROR NO. 12: OH, NO. ABSOLUTELY NOT. IT WAS  
12 A GENTLEMAN AT THE NEXT COURT.

13 THE COURT: NOW, LET'S JUST ASK YOU ONE LAST  
14 QUESTION.

15 JUROR NO. 12: SURE.

16 THE COURT: I ASSUME THAT NONE OF THAT IS GOING  
17 TO PREVENT YOU FROM BEING A COMPLETELY FAIR AND IMPARTIAL  
18 JUROR IN THIS CASE?

19 JUROR NO. 12: ABSOLUTELY. IT WOULD NEVER  
20 INTERFERE WITH MY --

21 THE COURT: ALL RIGHT. THEN I'M SATISFIED THAT  
22 WE DON'T HAVE A PROBLEM HERE.

23 BUT LET ME JUST SAY ONE THING THAT IS VERY  
24 IMPORTANT. ONE OF THE THINGS THAT I TOLD YOU AT THE VERY  
25 BEGINNING OF THE CASE IS THAT YOU ARE PROHIBITED BY LAW FROM  
26 HAVING ANY COMMUNICATIONS WITH ANY OF THE LAWYERS, AND THAT  
27 INCLUDES GIVING A NOTE TO A LAWYER.

28 JUROR NO. 12: I REMEMBER THAT.

4409

1 THE COURT: IF YOU WANT TO COMMUNICATE AT ALL  
2 WITH ANYBODY, IT'S GOT TO BE WITH ME, AND IT'S GOT TO GO  
3 THROUGH MY CLERK. YOU CANNOT UNDER THE LAW --

4 JUROR NO. 12: I'M SORRY. I MADE A GOOF. I  
5 REALIZE IT.

6 THE COURT: IT SOUNDS TO ME LIKE NO HARM HAS  
7 BEEN DONE.

8 JUROR NO. 12: IT WAS KIND OF AN IMPULSE. AND I  
9 THOUGHT IT WAS SO FUNNY. I THOUGHT IT WOULD BE NICE FOR HER  
10 TO KNOW SHE HAD MADE SUCH AN IMPACT.

11 I'LL BE VERY CAREFUL, YOUR HONOR. THANK YOU VERY  
12 MUCH.

13 THE COURT: THANK YOU.

14 (MS. WILSON LEFT THE CHAMBERS AREA)

15 (DISCUSSION OFF THE RECORD)

16 THE COURT: BACK ON THE RECORD.

17 IS EVERYBODY SATISFIED WITH THE WAY THIS WAS  
18 HANDLED AND ARE SATISFIED THAT THIS JUROR SHOULD REMAIN?

19 MS. CHABER: YES.

20 MR. HARDY: YES.

21 MR. ROSSE: YES.

22 MR. FURR: YES.

23 THE COURT: OKAY. THAT'S WHAT WE'LL DO.

24 (RECESS TAKEN FROM 1:56 TO 2:05 P.M.)

25 (THE FOLLOWING PROCEEDINGS WERE HELD IN THE  
26 COURTROOM, IN THE PRESENCE OF THE JURY)

27 THE COURT: GOOD AFTERNOON, EVERYBODY. WE STILL  
28 ARE GOING TO GET THE CASE TO YOU THE WEEK AFTER NEXT.

4410

1 OKAY.

2

3 DIRECT EXAMINATION (CONTINUED)

4 BY MR. ESCHER: Q. GOOD AFTERNOON, DR. MARTIN.

5 A. GOOD AFTERNOON.

6 Q. I THINK WE WERE AT EXHIBIT 5959, WHICH WAS THE  
7 1987 ECONOMIC REPORT OF THE PRESIDENT.  
8 A. YES.  
9 Q. IS THAT RIGHT?  
10 A. THAT'S CORRECT.  
11 Q. AND YOU RELIED ON THIS GOVERNMENTAL REPORT WITH  
12 RESPECT TO THE DEVELOPMENT OF YOUR OPINION WITH RESPECT TO  
13 THE EFFECT OR NONEFFECT OF CIGARETTE ADVERTISING ON GETTING  
14 PEOPLE TO SMOKE; IS THAT CORRECT?  
15 A. CORRECT.  
16 Q. AND DID YOU ALSO CONSIDER EVIDENCE THAT WAS IN  
17 EXISTENCE AS OF THIS DATE, WHICH IS ABOUT 1987, ABOUT THE  
18 EFFECT OF ADVERTISING BANS IN OTHER COUNTRIES?  
19 A. YES, I DID.  
20 Q. AND WHAT DO YOU MEAN BY AN "ADVERTISING BAN"?  
21 A. WELL, IN A NUMBER OF COUNTIES AROUND THE WORLD,  
22 FOR INSTANCE, NORWAY, ICELAND AND SO FORTH, THERE HAS BEEN A  
23 BAN ON ALL CIGARETTE ADVERTISING, PRINT, OUTDOOR, BROADCAST  
24 AND SO FORTH.  
25 Q. AND HAVE YOU CONCLUDED THAT THOSE SORTS OF  
26 ADVERTISING BANS ON CIGARETTE ADVERTISING HAVE NOT HAD AN  
27 EFFECT ON THE TOTAL AMOUNT OF CIGARETTES THAT ARE CONSUMED  
28 IN THOSE COUNTRIES?  
4411  
1 A. YES.  
2 Q. DID THE 1987 ECONOMIC REPORT OF THE PRESIDENT  
3 CONSIDER THAT INFORMATION AS WELL?  
4 A. I'M NOT SURE WHETHER THE ECONOMIC REPORT OF THE  
5 PRESIDENT DID, BUT I DO KNOW --  
6 MS. CHABER: WELL, I WOULD MOVE TO STRIKE.  
7 THE COURT: HOLD ON. WHEN YOU HEAR AN  
8 OBJECTION, YOU HAVE TO STOP TALKING.  
9 THE WITNESS: I'M SORRY.  
10 THE COURT: I'M GOING TO LEAVE IN THE ANSWER  
11 "I'M NOT SURE WHETHER THE ECONOMIC REPORT OF THE PRESIDENT  
12 DID," AND STRIKE THE BALANCE.  
13 MR. ESCHER: Q. NOW, THE 1987 ECONOMIC REPORT  
14 OF THE PRESIDENT WAS PREPARED BY THE FEDERAL TRADE  
15 COMMISSION; IS THAT RIGHT?  
16 A. NO, THAT'S NOT CORRECT.  
17 Q. WHICH GOVERNMENTAL ENTITY PREPARED THE 1987  
18 ECONOMIC REPORT?  
19 A. IT WAS PREPARED BY THE PRESIDENT'S OFFICE, AND  
20 ALSO BY THE COUNCIL OF ECONOMIC ADVISERS.  
21 Q. AND COULD YOU TELL US BRIEFLY WHAT THE FEDERAL  
22 TRADE COMMISSION IS.  
23 A. THE FEDERAL TRADE COMMISSION IS THE UNITED STATES  
24 AGENCY THAT OVERSEES, AMONG OTHER THINGS, ADVERTISING.  
25 Q. AND HAVE YOU CONSIDERED ANY MATERIALS PREPARED BY  
26 THE FEDERAL TRADE COMMISSION THAT RELATE TO THE SUBJECT OF  
27 ADVERTISING AND CIGARETTE SMOKING?  
28 A. YES, I HAVE.  
4412  
1 MR. ESCHER: YOUR HONOR, THIS DOCUMENT HAS BEEN  
2 MARKED AS DEFENDANTS' EXHIBIT 5976, AND IT'S IN BINDER 131.  
3 (DOCUMENT MORE PARTICULARLY  
4 LISTED IN THE INDEX MARKED  
5 FOR IDENTIFICATION DEFENDANTS'  
6 EXHIBIT # 5976)  
7 THE COURT: THANK YOU.  
8 MR. ESCHER: Q. ACTUALLY, DOCTOR, I THINK I'VE  
9 GIVEN YOU THE WRONG ONE.  
10 AND WHAT IS THIS DOCUMENT ENTITLED?

11 A. THIS DOCUMENT IS ENTITLED "THE EFFECT OF  
12 ADVERTISING ON THE LEVEL AND COMPOSITION" -- I'M SORRY --  
13 "OF CIGARETTE CONSUMPTION."  
14 IT IS AUTHORED BY JOSEPH P. MULHOLLAND, 1989.  
15 AND IT IS FROM THE -- IT IS FROM THE BUREAU OF  
16 ECONOMIC -- THE BUREAU OF ECONOMIC RESEARCH AT THE FEDERAL  
17 TRADE COMMISSION.  
18 Q. AND WAS THIS ONE OF THE GOVERNMENTAL REPORTS THAT  
19 YOU RELIED ON IN CONNECTION WITH THE DEVELOPMENT OF YOUR  
20 OPINIONS IN THIS CASE?  
21 A. YES, IT IS.  
22 Q. AND YOU CONSIDER THIS REPORT SUPPORTIVE OF YOUR  
23 POSITION THAT CIGARETTE ADVERTISING DOES NOT, IN FACT,  
24 EITHER CAUSE SMOKING INITIATION OR AFFECT THE TOTAL  
25 CONSUMPTION OF CIGARETTES?  
26 A. THAT IS CORRECT. IT DOESN'T.  
27 Q. HAVE YOU PERSONALLY COMPARED CIGARETTE  
28 CONSUMPTION, THE PATTERN OF THAT OVER TIME, AGAINST  
4413  
1 MARKETING, SPENDING, AND IN PARTICULAR, THE PATTERN OF THAT  
2 OVER TIME, IN CONNECTION WITH YOUR PREPARATION FOR THIS  
3 CASE?  
4 A. YES, I HAVE.  
5 Q. DID YOU GET DATA ON MARKETING SPENDING FROM A  
6 GOVERNMENTAL ENTITY IN CONNECTION WITH THAT?  
7 A. YES, I DID.  
8 Q. AND WHICH ENTITY WAS THAT?  
9 A. THAT IS -- THERE IS DATA FROM THE FEDERAL TRADE  
10 COMMISSION, WHICH BY LAW IS REPORTED BY THE CIGARETTE  
11 COMPANIES TO THE FTC.  
12 Q. IS THAT DONE ON AN ANNUAL BASIS?  
13 A. YES, IT IS.  
14 Q. ARE THE CIGARETTE COMPANIES REQUIRED BY LAW TO  
15 REPORT BOTH ADVERTISING EXPENDITURES AND OTHER PROMOTIONAL  
16 EXPENDITURES?  
17 A. YES, THEY ARE.  
18 Q. DOCTOR, I'D LIKE YOU TO TAKE A QUICK LOOK AT ONE  
19 OF THE CHARTS THAT WE HAVE SEEN PREVIOUSLY.  
20 YOU'VE SEEN THIS ONE, IF YOU CAN SEE. CAN YOU  
21 SEE IT ALL RIGHT?  
22 A. YES, I CAN.  
23 Q. THIS WAS THE CHART THAT WE HAD LOOKED AT EARLIER,  
24 WHICH IS DEFENDANTS' EXHIBIT 6263, WHICH SHOWS THE DECLINING  
25 RATE OF CIGARETTE SMOKING OVER TIME FROM 1965 TO 1995?  
26 A. YES. IT SHOWS THE PERCENTAGE OF SMOKERS HAS BEEN  
27 DECLINING DURING THAT PERIOD OF TIME.  
28 Q. THAT'S BY APPROXIMATELY HALF, IS THAT RIGHT, IN  
4414  
1 AGGREGATE?  
2 A. I WOULD SAY ABOUT HALF IN THE AGGREGATE, YES.  
3 Q. AND HAVE YOU PREPARED A CHART THAT SHOWS THE  
4 ADVERTISING AND PROMOTIONAL EXPENDITURES AS REPORTED TO THE  
5 FEDERAL TRADE COMMISSION FROM 1970 TO 1995?  
6 A. YES, I HAVE.  
7 Q. IF YOU COULD EXPLAIN WHAT THE GREEN PART OF THIS  
8 CHART IS.  
9 MS. CHABER: IT'S NOT MARKED.  
10 MR. ESCHER: I'M SORRY. THIS SHOULD BE MARKED  
11 AS DEFENDANTS' EXHIBIT 6268.  
12 (DOCUMENT MORE PARTICULARLY  
13 LISTED IN THE INDEX MARKED  
14 FOR IDENTIFICATION DEFENDANTS'  
15 EXHIBIT # 6268)

16 THE COURT: DOES THAT HAVE A TITLE ON IT? IS  
17 THAT AMONG THE DOCUMENTS YOU GAVE ME?  
18 MR. ESCHER: YES, IT IS, YOUR HONOR.  
19 THE COURT: IF YOU JUST SHOW IT TO ME, THEN I  
20 CAN JUST COMPARE IT.  
21 THE CLERK: YOU HAVE TO LET ME SEE IT.  
22 THE COURT: VERA NEEDS SOME IDENTIFYING  
23 INFORMATION.  
24 MR. ESCHER: LET'S SEE IF THIS WILL HELP.  
25 THE IDENTIFYING INFORMATION, IT'S A GRAPH OF  
26 TOTAL SPENDING AND ADVERTISING SPENDING FROM 1970 TO 1995,  
27 AND THAT'S WHAT IT IS.  
28 THE CLERK: THANK YOU.

4415  
1 MR. ESCHER: Q. DOCTOR, IF WE CAN TURN NOW TO  
2 THE CHART ITSELF.  
3 WHAT IS THE GREEN PART OF THE GRAPH?  
4 A. THE GREEN PART OF THE GRAPH REFLECTS THE TOTAL  
5 SPENDING ON ALL OF THE ELEMENTS THAT ARE REQUIRED TO BE  
6 REPORTED TO THE FEDERAL TRADE COMMISSION UNDER PROMOTIONAL  
7 SPENDING BY THE CIGARETTE COMPANIES.  
8 Q. SO IT SAYS "PROMOTIONAL ALLOWANCES, COUPON &  
9 RETAIL VALUE ADDED."  
10 ARE BOTH OF THOSE ITEMS THAT YOU PREVIOUSLY  
11 DISCUSSED AS BEING PART OF PRICING WHEN YOU WENT THROUGH THE  
12 FOUR P'S?  
13 A. YES, I DID.  
14 Q. HOW ABOUT "SPECIALTY ITEMS"; WHAT IS THAT?  
15 A. "SPECIALTY ITEMS" WOULD BE THOSE ITEMS THAT  
16 SOMEBODY COULD ACQUIRE FROM THE CIGARETTE COMPANY; FOR  
17 INSTANCE, A JACKET OR A HAT OR SOMETHING OF THAT SORT.  
18 Q. OKAY. AND "PUBLIC ENTERTAINMENT"; WHAT WOULD  
19 THAT CONSTITUTE?  
20 A. THAT WOULD CONSTITUTE, FOR INSTANCE, SPONSORSHIP  
21 OF ROAD RACES OR SOME KIND OF PUBLIC ENTERTAINMENT EVENT.  
22 Q. AND THE NEXT ITEM SAYS: "ADVERTISING SPENDING  
23 BELOW."  
24 IS THAT SIMPLY A REFERENCE TO THE ORANGE PART OF  
25 THE GRAPH?  
26 A. THAT IS CORRECT.  
27 Q. THAT'S BECAUSE THE GREEN PART OF THE GRAPH BUILDS  
28 ON THE ORANGE PART; IS THAT RIGHT?

4416  
1 A. THAT'S CORRECT.  
2 Q. BOTH ASPECTS OF THE GRAPH, ADVERTISING SPENDING  
3 AND TOTAL SPENDING, ARE THOSE IN ACTUAL DOLLARS?  
4 A. YES, THEY ARE.  
5 Q. SO THERE'S NO ATTEMPT TO TAKE INTO ACCOUNT THE  
6 EFFECT OF INFLATION OVER TIME?  
7 A. NO, I DID NOT TRY TO DO THAT.  
8 Q. SO THEY'RE NOT IN CONSTANT 1970 DOLLARS OR  
9 ANYTHING LIKE THAT?  
10 A. NO, THEY ARE NOT.  
11 Q. SO IF YOU TOOK INTO ACCOUNT THE EFFECTS OF  
12 INFLATION OVER TIME, HOW WOULD THAT AFFECT THE SHAPE OF  
13 THESE CHARTS?  
14 MS. CHABER: OBJECTION. FOUNDATION.  
15 MR. ESCHER: IT'S A REALLY BAD QUESTION. I WILL  
16 TRY REASKING IT.  
17 Q. DOCTOR, HAVE YOU DONE SOME ROUGH CALCULATION OF  
18 HOW INFLATION OVER TIME WOULD AFFECT THESE TWO CHARTS?  
19 MS. CHABER: OBJECTION. FOUNDATION.  
20 THE COURT: THE QUESTION IS: HAS HE DONE --

21 MS. CHABER: NO.  
22 THE COURT: -- ANY CALCULATION THAT HAS --  
23 MS. CHABER: ANY ROUGH CALCULATION.  
24 THE COURT: THE OBJECTION IS THE WORD "ROUGH"?  
25 MS. CHABER: THE FOUNDATION TO HIS EXPERIENCE  
26 AND WHAT IT'S BASED ON AND SO FORTH TO HIS CALCULATIONS.  
27 MR. ESCHER: I WILL ASK ANOTHER QUESTION, YOUR  
28 HONOR.  
4417  
1 Q. WOULD THE EFFECT OF INFLATION OVER TIME BE TO  
2 DEPRESS THE SIZE OF THE GREEN AND ORANGE PARTS OF THIS  
3 GRAPH?  
4 A. YES, IT WOULD.  
5 Q. FINE. LOOKING AT EXHIBIT 6268, THE GRAPH THAT WE  
6 HAVE BEEN TALKING ABOUT, DOES THIS INDICATE TO YOU THAT  
7 TOTAL SPENDING ON CIGARETTE ADVERTISING AND PROMOTION HAS  
8 CAUSED CIGARETTE CONSUMPTION TO RISE OVER THAT TIME PERIOD?  
9 A. WELL, IT'S PRETTY OBVIOUS IT HAS NOT, BECAUSE ONE  
10 GOES UP AND THE OTHER GOES DOWN.  
11 Q. AND LOOKING AT THE GREEN PART OF THE GRAPH, THE  
12 TOTAL SPENDING, WHAT IS THE BIGGEST SINGLE ITEM IN THE GREEN  
13 PART OF THE GRAPH?  
14 A. MY RECOLLECTION FROM THAT IS THE LARGEST ITEM  
15 THERE WOULD BE "PROMOTIONAL ALLOWANCES," WITH "COUPON &  
16 RETAIL VALUE ADDED" AS SECOND.  
17 Q. SO THOSE WOULD BOTH BE PARTS OF THE PRICE P OF  
18 THE FOUR P'S THAT YOU DISCUSSED EARLIER?  
19 A. THAT IS CORRECT.  
20 Q. SO BOTH "PROMOTIONAL ALLOWANCES" AND THE "COUPON  
21 & RETAIL VALUE ADDED" WOULD BE PRICE ITEMS RATHER THAN  
22 ADVERTISING ITEMS?  
23 A. THAT IS CORRECT.  
24 Q. AND THE ADVERTISING ITEMS THEMSELVES, WHAT WOULD  
25 THOSE BE COMPOSED OF?  
26 A. THE ADVERTISING ITEMS AS THEY ARE OUTLINED HERE  
27 IN THE ORANGE WOULD BE OUTDOOR ADVERTISING, MAGAZINE OR  
28 NEWSPAPER ADVERTISING, AND THAT ADVERTISING THAT IS DONE AT  
4418  
1 THE RETAIL POINT OF SALE.  
2 Q. NOW, IS THERE A WAY TO COMPARE ADVERTISING  
3 SPENDING BY CIGARETTE COMPANIES RELATIVE TO OTHER  
4 INDUSTRIES?  
5 A. YES, THERE IS.  
6 Q. AND HOW WOULD YOU DO THAT?  
7 A. WELL, THERE IS REPORTED THE EXPENDITURES OF  
8 ADVERTISING-TO-SALES RATIOS THAT IS UNDERTAKEN BY THE  
9 NEWSPAPER THAT IS MOST PREVALENT IN THE ADVERTISING  
10 INDUSTRY. THAT IS ADVERTISING AGE.  
11 AND THEY COLLECT THAT ADVERTISING-TO-SALES RATIO,  
12 THAT IS, HOW MUCH -- HOW MANY DOLLARS OF ADVERTISING ARE  
13 SPENT RELATIVE TO THE AMOUNT OF SALES OF THOSE INDUSTRIES IN  
14 THE UNITED STATES.  
15 Q. AND HOW DOES THE CIGARETTE INDUSTRY'S TOTAL  
16 EXPENDITURES ON ADVERTISING COMPARE TO OTHER INDUSTRIES IN  
17 GENERAL TERMS?  
18 A. IN GENERAL TERMS, THE CIGARETTE INDUSTRIES COME  
19 IN AT ABOUT --OH, ABOUT THE TWO-THIRDS LEVEL OF  
20 ADVERTISING-TO-SALES RATIO.  
21 AND THERE ARE OTHER INDUSTRIES THAT COME IN  
22 HIGHER AND THERE ARE OTHERS, OBVIOUSLY, THAT COME IN LOWER.  
23 Q. COULD YOU GIVE US SOME EXAMPLES OF INDUSTRIES  
24 THAT COME IN HIGHER?  
25 A. I THINK, YOU KNOW, MY RECOLLECTION WAS THAT THERE

26 WERE SOAP AND DETERGENTS AND THINGS OF THAT SORT THAT CAME  
27 IN HIGHER.

28 Q. WHAT ABOUT PERFUME?

4419

1 A. YES, PERFUME WAS HIGHER.

2 Q. WHAT WOULD BE SOME EXAMPLES OF INDUSTRIES WITH  
3 LOWER ADVERTISING-TO-SALES RATIO FIGURES THAN CIGARETTES?

4 A. I'M TRYING TO RECALL. I GUESS ONE OF THEM WAS  
5 SOFTWARE OR COMPUTERS.

6 Q. ARE THERE OTHER MEASURES OF ADVERTISING  
7 EXPENDITURE THAT ARE COMMON IN YOUR MARKETING FIELD?

8 A. YES.

9 Q. WHY DON'T YOU EXPLAIN THOSE, PLEASE.

10 A. THERE IS ANOTHER MEASURE THAT IS UNDERTAKEN BY  
11 THE SAME NEWSPAPER, ADVERTISING AGE. AND WHAT IT ATTEMPTS  
12 TO DO IS TO GET A REPORT, NOT ON ADVERTISING-TO-SALES RATIOS  
13 OR ANYTHING LIKE THAT, BUT JUST TOTAL SPENDING ON  
14 ADVERTISING, FOR WHAT THEY CALL THE MEGABRANDS.

15 SO THESE ARE THE BRANDS, NOT THE PRODUCT  
16 CATEGORY, AND HOW MUCH MONEY IS SPENT ON A BRAND COMPARED TO  
17 OTHER BRANDS OF ALL KIND OF DIFFERENT PRODUCTS.

18 AND THEY ARE RANK-ORDERED BY ADVERTISING AGE.

19 Q. AND WHERE DO CIGARETTE COMPANIES COME IN IN  
20 CONNECTION WITH THOSE SORTS OF MEASURES?

21 A. THE DATA THAT I HAD IS THAT THERE IS ONLY ONE  
22 CIGARETTE BRAND THAT APPEARS IN THE 200 MEGABRANDS AND IT'S  
23 MARLBORO. IT COMES ABOUT IN ABOUT 51ST.

24 AS IT TURNS OUT, THE BRAND THAT IS AT THE TOP IS  
25 AT&T, FOR TELEPHONE SERVICES.

26 SO THE ONLY -- OF THE 10 LEADING BRANDS OF  
27 CIGARETTES, THE ONLY ONE THAT IS IN THE TOP 200 BRANDS OF  
28 PRODUCTS IS MARLBORO.

4420

1 Q. AND ABOUT WHERE IS THAT IN THE RANKING?

2 A. I THINK IT'S THE 51ST.

3 Q. HOW ABOUT CAMEL CIGARETTES; DO THEY COME IN  
4 WITHIN THAT TOP 200?

5 A. NO, THEY DO NOT.

6 Q. AND MARLBORO IS THE ONLY ONE IN THE TOP 200?

7 A. MARLBORO IS THE ONLY BRAND OF THE TOP 10 BRANDS  
8 THAT COMES IN IN THE TOP 200.

9 Q. DOCTOR, YOU HAD PREVIOUSLY TALKED ABOUT  
10 GOVERNMENTAL RESEARCH. AND ONE OF THE OTHER ITEMS YOU SAID  
11 THAT YOU LOOKED AT AS A CATEGORY OF EVIDENCE WAS SCIENTIFIC  
12 RESEARCH.

13 COULD YOU DESCRIBE THE KINDS OF RESEARCH THAT  
14 HAVE BEEN CONDUCTED CONCERNING SMOKING INITIATION IN THE  
15 SCIENTIFIC COMMUNITY OVER THE LAST 40 YEARS OR SO.

16 A. WELL, ONE OF THE MAJOR STUDIES THAT COMES TO MIND  
17 IS ONE THAT WAS DONE BY MY OWN UNIVERSITY. IT IS CALLED  
18 "MONITORING THE FUTURE." AND IT IS A STUDY THAT -- IT IS  
19 CONDUCTED BY THE INSTITUTE FOR SOCIAL RESEARCH AT MICHIGAN  
20 UNDER A GOVERNMENT CONTRACT, TO MONITOR WHAT IS GOING ON  
21 AMONG ADOLESCENTS IN SOCIETY.

22 AND PARTICULARLY, THEY HAVE FOCUSED IN ON CERTAIN  
23 KIND OF BEHAVIORS, INCLUDING SMOKING BEHAVIOR AND THE USE OF  
24 DRUGS.

25 Q. AND GENERALLY, FROM YOUR REVIEW OF THE SCIENTIFIC  
26 RESEARCH, HAS THAT BEEN CONSISTENT WITH WHAT YOU LEARNED  
27 FROM THE GOVERNMENTAL RESEARCH WITH RESPECT TO THE SUBJECT  
28 OF THE RELATIONSHIP BETWEEN CIGARETTE ADVERTISING AND

4421

1 CIGARETTE CONSUMPTION?



2 A. IT IS CONSISTENT WITH ALL OF THE -- THERE'S  
3 CONSISTENCY ACROSS ALL OF THE RESEARCH ON THAT ISSUE.  
4 Q. AND THAT'S CONSISTENT IN THE DIRECTION OF BEING  
5 SUPPORTIVE OF THE OPINION YOU'VE ALREADY EXPRESSED; IS THAT  
6 RIGHT?  
7 A. THAT IS CORRECT.  
8 Q. ARE YOU FAMILIAR WITH AN ARTICLE IN 1992 FROM  
9 CONRAD, FLAY & HILL?  
10 A. YES.  
11 Q. AND DID YOU TAKE THAT INTO ACCOUNT IN REVIEWING  
12 MATERIALS AND DEVELOPING YOUR OPINION IN THIS CASE?  
13 A. YES. THAT'S AN ARTICLE IN THE BRITISH JOURNAL OF  
14 ADDICTION, I BELIEVE.  
15 MR. ESCHER: LET ME GET THAT, YOUR HONOR.  
16 YOUR HONOR, I'M HAVING THIS ONE MARKED AS  
17 DEFENDANTS' EXHIBIT 6269.  
18 (DOCUMENT MORE PARTICULARLY  
19 LISTED IN THE INDEX MARKED  
20 FOR IDENTIFICATION DEFENDANTS'  
21 EXHIBIT # 6269)  
22 THE CLERK: IS THAT A BLOWUP?  
23 THE COURT: NO, IT'S AN ARTICLE.  
24 ON THE HARD-COPY DOCUMENTS, I THINK WE HAVE TO  
25 GIVE VERA THE ORIGINAL.  
26 MR. ESCHER: I THOUGHT WE'D GIVE ALL THOSE TO  
27 VERA AT THE END OF THIS TESTIMONY, IF THAT'S ACCEPTABLE.  
28 THE COURT: IS THAT OKAY?  
4422  
1 THE CLERK: YES.  
2 THE COURT: LET ME JUST SUGGEST YOU DO GIVE VERA  
3 THE COPY THAT SHE IS GOING TO GIVE ME.  
4 THAT WAY, SHE CAN KEEP A RECORD OF ITS BEING  
5 PASSED TO ME.  
6 MR. ESCHER: Q. COULD YOU DESCRIBE FOR US WHAT  
7 THIS EXHIBIT FROM THE BRITISH JOURNAL OF ADDICTION IS.  
8 A. THIS IS AN ARTICLE, AS YOU'VE ALREADY DESCRIBED,  
9 BY CONRAD, FLAY & HILL ENTITLED "RESEARCH REPORT: WHY  
10 CHILDREN START SMOKING CIGARETTES, PREDICTOR OF ONSET."  
11 IT APPEARED IN THE BRITISH JOURNAL OF ADDICTION,  
12 VOLUME 87, NO. 12, ON DECEMBER, 1992.  
13 Q. AND DOES THIS REFER TO OTHER STUDIES?  
14 A. YES, IT DOES. IT'S A REVIEW OF FINDINGS.  
15 MS. CHABER: YOUR HONOR, I THINK WE NEED TO BE  
16 CAREFUL HERE ABOUT TESTIFYING ABOUT HEARSAY.  
17 MR. ESCHER: WE ARE GOING TO BE CAREFUL.  
18 THE COURT: OKAY. HE SAID "YES," AND THAT  
19 ANSWERS THE QUESTION.  
20 MR. ESCHER: Q. AND HOW MANY OTHER STUDIES WERE  
21 INVOLVED?  
22 A. 27.  
23 Q. AND IS THIS WHAT YOU CALL A MEGASTUDY?  
24 A. I GUESS YOU WOULD CALL IT A MEGASTUDY.  
25 Q. THAT JUST MEANS IT'S A STUDY THAT INVOLVES A  
26 BUNCH OF OTHER STUDIES; IS THAT RIGHT?  
27 A. CORRECT.  
28 Q. AND DID YOU REVIEW THIS ARTICLE IN CONNECTION  
4423  
1 WITH DEVELOPING YOUR OPINIONS IN THIS CASE?  
2 A. YES, I DID.  
3 Q. AND WAS THIS ARTICLE SUPPORTIVE OF YOUR  
4 CONCLUSION THAT CIGARETTE ADVERTISING WAS NOT PREDICTIVE  
5 WITH RESPECT TO SMOKE INITIATION?  
6 MS. CHABER: I'M GOING TO OBJECT, YOUR HONOR. I

7 THINK HE'S TESTIFYING TO THE CONTENTS OF THE DOCUMENT.  
8 THE COURT: SUSTAINED. I DO TOO.  
9 MR. ESCHER: Q. HAVE YOU PERSONALLY EXAMINED  
10 DATA LIKE THE RESEARCHERS IN SOME OF THESE OTHER ARTICLES  
11 AND STUDIES WE HAVE SEEN?  
12 A. YES, I HAVE.  
13 Q. WHY DON'T YOU TELL US ABOUT THE WORK WITH DATA  
14 THAT YOU HAVE DONE PERSONALLY.  
15 A. THE DATA THAT I HAVE EXAMINED IS THE -- WHAT IS  
16 KNOWN AS TAPS 1 AND 2. THIS IS DATA THAT DEALS WITH  
17 TEENAGERS. IT IS A VERY LARGE, NATIONAL SAMPLE OF TEENAGERS  
18 THAT WAS CONDUCTED IN 1989 AND 1993, AGAIN.  
19 SO IT'S TWO DIFFERENT YEARS. IT WAS CONDUCTED BY  
20 THE CENTER FOR DISEASE CONTROL, THE U.S. GOVERNMENT. IT  
21 INVOLVES A VERY LARGE SAMPLE OF OVER 13,000 TEENAGERS, AND  
22 SOME OF THE TEENAGERS THAT WERE IN THE 1989 STUDY WERE  
23 RESURVEYED IN 1993. SOME OF THOSE IN 1993 --  
24 MS. CHABER: YOUR HONOR, I THINK WE ARE GETTING  
25 INTO THE CONTENTS.  
26 THE COURT: WE MAY BE. WHY DON'T YOU ASK  
27 ANOTHER QUESTION.  
28 MR. ESCHER: Q. IS THIS A LONGITUDINAL STUDY?  
4424  
1 A. YES, IT IS.  
2 Q. COULD YOU DESCRIBE FOR US WHAT A LONGITUDINAL  
3 STUDY IS IN YOUR AREA.  
4 A. A LONGITUDINAL STUDY MEANS THAT YOU TAKE SUBJECTS  
5 IN ONE PERIOD OF TIME AND RESTUDY THE VERY SAME PEOPLE IN A  
6 FUTURE PERIOD OF TIME.  
7 Q. IS THERE ANYTHING THAT'S PARTICULARLY USEFUL  
8 ABOUT A LONGITUDINAL STUDY AS OPPOSED TO THE OTHER KIND OF  
9 STUDIES?  
10 A. YES. BECAUSE IT ALLOWS US TO LOOK AT THE VERY  
11 SAME PEOPLE AND TO TRACE THEIR BEHAVIOR OVER TIME.  
12 Q. AND THIS LONGITUDINAL STUDY FROM THE TAPS SURVEY  
13 THAT YOU PERSONALLY PREPARED, DID YOU BRING A CHART  
14 SUMMARIZING SOME OF YOUR CONCLUSIONS FROM THAT DATA?  
15 A. YES, I DID.  
16 MS. CHABER: YOUR HONOR, I THINK WE ARE GOING TO  
17 NEED A SIDEBAR ON THIS. I THINK WE'RE STILL GETTING INTO  
18 HEARSAY.  
19 THE COURT: HE'S SAYING -- THE QUESTION WAS SOME  
20 OF DR. MARTIN'S CONCLUSIONS. HE DIDN'T SAY CONCLUSIONS FROM  
21 THE DATA.  
22 MS. CHABER: YES. I THOUGHT -- I THOUGHT THAT'S  
23 WHAT I HAD HEARD.  
24 THE COURT: NO. HE SAID "YOUR CONCLUSIONS FROM  
25 THE DATA." HE DIDN'T SAY "THE CONCLUSIONS IN THE DATA."  
26 IS THAT CORRECT? IS THAT WHAT YOU SAID?  
27 THE WITNESS: I BELIEVE IT IS, YOUR HONOR.  
28 THE COURT: THAT'S THE WAY THE RECORD READS.  
4425  
1 THAT'S MY UNDERSTANDING.  
2 DOES THIS HAVE A NUMBER?  
3 MR. ESCHER: I WILL GET THE NUMBER RIGHT NOW,  
4 YOUR HONOR.  
5 IT IS 6270, YOUR HONOR.  
6 (DOCUMENT MORE PARTICULARLY  
7 LISTED IN THE INDEX MARKED  
8 FOR IDENTIFICATION DEFENDANTS'  
9 EXHIBIT # 6270)  
10 MR. ESCHER: Q. DR. MARTIN, IS THIS THE CHART  
11 THAT YOU PREPARED IN CONNECTION WITH THIS LONGITUDINAL STUDY

12 FROM THE TAPS DATA?  
13 A. YES, IT IS.  
14 Q. AND COULD YOU EXPLAIN FOR US HOW THIS CHART  
15 WORKS, HOW TO READ IT.  
16 A. WELL, THE CHART WORKS IN THE FOLLOWING WAYS:  
17 THERE IS A BAR THAT IS RED, AND THOSE ARE PEOPLE WHO ARE  
18 IDENTIFIED AS STARTERS. STARTERS ARE PEOPLE WHO, IN 1989,  
19 DID NOT SMOKE CIGARETTES OR NEVER HAD SMOKED A CIGARETTE,  
20 BUT THAT IN 1993 HAD SMOKED AT LEAST 100 CIGARETTES, AND HAD  
21 SMOKED A CIGARETTE WITHIN THE LASTS 30 DAYS.  
22 SO IT IS PEOPLE WHO DID NOT SMOKE IN THE FIRST  
23 TIME PERIOD AND WERE IDENTIFIED AS SMOKING AT LEAST 100  
24 CIGARETTES OVER THAT PERIOD OF TIME, THAT FOUR-YEAR PERIOD  
25 OF TIME, AND WHO SMOKED WITHIN THE LAST 30 DAYS BEFORE THE  
26 SURVEY.  
27 THE ONES THAT ARE IN KIND OF GREEN ARE WHAT ARE  
28 CALLED NONSTARTERS. THOSE ARE PEOPLE WHO DID NOT SMOKE IN  
4426 1989, NEVER HAD SMOKED, NEVER EXPERIMENTED, AND BY 1993,  
2 NEVER HAD SMOKED, NEVER HAD EXPERIMENTED.  
3 SO THERE ARE TWO CLASSIFICATIONS OF PEOPLE IN  
4 HERE.  
5 AND THEN WHAT YOU SEE ON THE CHART IS THE  
6 PERCENTAGE OF STARTERS, THE PERCENTAGE OF NONSTARTERS ON  
7 CERTAIN DIMENSIONS ALONG THE BOTTOM OF THE GRID.  
8 Q. SO IN TRYING TO UNDERSTAND THE RELATIONSHIP  
9 BETWEEN THESE DIFFERENT FACTORS AND SMOKING INITIATION, DO  
10 WE LOOK TO SEE HOW HIGH THE RED BAR IS OR ARE WE LOOKING TO  
11 THE DIFFERENCE BETWEEN THE RED BAR AND THE GREEN BAR?  
12 A. I THINK IT'S IMPORTANT TO LOOK AT BOTH. I THINK  
13 THE HEIGHT OF THE RED BAR IS SIGNIFICANT, BUT EVEN MORE  
14 SIGNIFICANT PERHAPS IS THE DIFFERENCE BETWEEN THE RED AND  
15 THE GREEN BARS.  
16 Q. AND WHICH ONE OF THESE CATEGORIES HAS THE BIGGEST  
17 DIFFERENCE BETWEEN THE RED AND GREEN BARS?  
18 A. IT IS PEER SMOKING.  
19 Q. THAT'S "FRIENDS SMOKING"?  
20 A. YES.  
21 Q. AND WHAT'S THE SECOND BIGGEST?  
22 A. I'LL HAVE TO COME LOOK. IF I CAN JUST FOCUS A  
23 MOMENT, IF I CAN. THE SECOND LARGEST WE CAN SEE IS  
24 "TEACHERS SMOKING," THAT IS TO -- THAT IS THE LARGEST  
25 PERCENTAGE FOR SMOKERS.  
26 AND ACTUALLY, THE DIFFERENCE BETWEEN THE TWO,  
27 BETWEEN STARTERS AND NONSTARTERS, IS ALSO IN NO. 2 PLACE.  
28 AND IT IS SIGNIFICANTLY DIFFERENT.  
4427  
1 Q. SO THEN, WHAT WOULD BE THE SINGLE LARGEST  
2 ASSOCIATION BETWEEN ONE OF THESE FACTORS AND INITIATION OF  
3 SMOKING BY YOUTH?  
4 A. "FRIENDS SMOKING."  
5 Q. AND THAT'S CONSISTENT WITH YOUR CONCLUSION  
6 GENERALLY FROM THE DATA THAT YOU HAVE REVIEWED?  
7 A. YES, IT IS.  
8 Q. JUST LOOKING AT THESE CATEGORIES AGAIN FOR A  
9 MOMENT, ARE THERE ANY CATEGORIES HERE THAT WEREN'T PRESENT  
10 IN CONNECTION WITH LESLIE WHITELEY?  
11 A. THE ONLY ONE -- YES, THERE ARE TWO.  
12 NO, THERE'S ONLY ONE. THAT WOULD BE "PARENTS  
13 SMOKING." AS WE HAVE DESCRIBED EARLIER, MRS. WHITELEY SAYS  
14 THAT NEITHER OF HER PARENTS WERE SMOKING DURING THE TIME SHE  
15 WAS IN THE HOUSEHOLD, BUT THERE WAS SOMEONE SMOKING IN THE  
16 HOUSEHOLD.

17 HER OLDER SIBLINGS SMOKED, FRIENDS SMOKED AND SHE  
18 PERCEIVED THAT HER TEACHERS SMOKED.

19 Q. BUT THE "TEACHERS SMOKING," THAT'S SAME THING AS  
20 WHAT WE HAD DISCUSSED EARLIER AS BEING THE ROLE MODEL?

21 A. THAT'S CORRECT.

22 Q. THANK YOU. YOU CAN SIT DOWN, PLEASE.

23 A. THANK YOU.

24 Q. GET THE LIGHTS, PLEASE.

25 YOU INDICATED EARLIER THAT THE UNIVERSITY OF  
26 MICHIGAN, WHICH IS THE SCHOOL YOU WORK IN, COLLECTS DATA ON  
27 THE ATTITUDES OF YOUNG PEOPLE ABOUT SMOKING?

28 A. YES, THEY DO THAT.

4428

1 Q. AND WHAT IS THAT CALLED AGAIN?

2 A. THIS IS CALLED "MONITORING THE FUTURE."

3 Q. AND YOUR REVIEW OF MATERIALS IN THIS "MONITORING  
4 THE FUTURE" STUDIES, WAS THAT ONE OF THE BASES FOR YOUR  
5 OPINION IN THIS CASE?

6 A. YES, IT WAS.

7 Q. AND DID YOUR REVIEW OF THOSE MATERIALS HELP YOU  
8 IN DEVELOPING YOUR OPINION?

9 A. THEY DO, INDEED.

10 Q. AND WHAT IN PARTICULAR IN THE "MONITORING THE  
11 FUTURE" STUDIES DID YOU FIND HELPFUL IN DEVELOPING YOUR  
12 OPINION?

13 A. THE THINGS THAT WERE HELPFUL IN MY OPINION --  
14 MS. CHABER: YOUR HONOR, I THINK WE'RE GOING TO  
15 GET INTO THE CONTENTS OF THE DOCUMENT.

16 THE COURT: THAT IS AN OPEN-ENDED QUESTION THAT  
17 WOULD BE SUSCEPTIBLE TO THAT INTERPRETATION.

18 I SUGGEST, IF THAT'S NOT WHAT YOU'RE ASKING, THAT  
19 YOU REPHRASE THE QUESTION. IF IT IS WHAT YOU'RE ASKING,  
20 THEN IT'S SUSTAINED.

21 MS. CHABER: Q. WHAT CONCLUSIONS DID YOU REACH  
22 WITH RESPECT TO THE ISSUE OF INITIATION OF SMOKING BY MINORS  
23 AFTER YOU REVIEWED SOME OF THE UNIVERSITY OF MICHIGAN  
24 "MONITORING THE FUTURE" DATA?

25 A. THE CONCLUSION I REACHED, WHICH IS CONSISTENT  
26 WITH THE CONCLUSION I HAVE REACHED OUT OF LOOKING AT -- OVER  
27 ALL THE OTHER RESEARCH, IS THAT THERE IS AN ASSOCIATION  
28 BETWEEN THE SMOKING BY MINORS AND RISK-TAKING BEHAVIOR, IN  
4429

1 PARTICULAR, THE USE OF ILLICIT DRUGS.

2 Q. GOING BACK TO THE CHART WHICH WE HAD PREVIOUSLY,  
3 WHEN YOU TOLD US WHAT SORT OF EVIDENCE YOU HAD REVIEWED  
4 REGARDING THE INFLUENCE OF VARIOUS FACTORS IN SOCIETY ON  
5 SMOKING BEHAVIOR, WE HAVE NOW TALKED ABOUT "CONSUMER  
6 BEHAVIOR"; IS THAT RIGHT?

7 A. THAT IS CORRECT.

8 Q. "GOVERNMENTAL RESEARCH"; WE DISCUSSED THAT?

9 A. YES.

10 Q. "SCIENTIFIC RESEARCH" AS WELL?

11 A. YES.

12 Q. AND HOW ABOUT "POLLING DATA"; HAVE WE DISCUSSED  
13 THAT?

14 A. I BELIEVE WE HAVE.

15 Q. AND WHAT ABOUT "OTHER RISK BEHAVIORS"; WHAT DO  
16 YOU MEAN BY THAT?

17 A. WELL, I MEAN THERE ARE OTHER THINGS THAT  
18 ADOLESCENTS ENGAGE IN AS RISK-TAKING. AND ON THAT ONE, AS I  
19 MENTIONED EARLIER, I COME TO THE CONCLUSION THAT THERE IS A  
20 RELATIONSHIP BETWEEN CERTAIN RISK-TAKING AND CIGARETTE  
21 SMOKING, AND PARTICULARLY THE USE OF ILLICIT DRUGS.

22 THE SECOND CONCLUSION THAT I REACH OUT OF THIS IS  
23 THAT ADOLESCENTS ENGAGE IN RISK-TAKING BEHAVIOR, AND MANY OF  
24 THOSE BEHAVIORS ARE MORE PREVALENT AND OF A HIGHER --  
25 THERE'S A HIGHER PERCENTAGE OF ENGAGEMENT IN THOSE  
26 RISK-TAKING BEHAVIORS THAN THERE IS OF CIGARETTE SMOKING.  
27 Q. AND HAVE YOU PREPARED A CHART IN CONNECTION WITH  
28 YOUR CONCLUSIONS WITH RESPECT TO "YOUTH RISK BEHAVIORS"?

4430

1 A. YES, I HAVE.  
2 MR. ESCHER: YOUR HONOR, I'D LIKE TO HAVE THAT  
3 MARKED AS EXHIBIT 6271.  
4 (DOCUMENT MORE PARTICULARLY  
5 LISTED IN THE INDEX MARKED  
6 FOR IDENTIFICATION DEFENDANTS'  
7 EXHIBIT # 6271)  
8 MR. ESCHER: IT'S ENTITLED "YOUTH RISK  
9 BEHAVIORS, HIGH SCHOOL STUDENTS, (1995)."  
10 (ATTORNEYS CONFER)  
11 MR. ESCHER: Q. IS THIS THE CHART YOU PREPARED  
12 IN CONNECTION WITH COMPARING CIGARETTE SMOKING WITH OTHER  
13 RISKY BEHAVIORS BY HIGH SCHOOL STUDENTS?

14 A. YES, IT IS.  
15 Q. WHY DON'T YOU EXPLAIN THIS CHART TO US, PLEASE.  
16 A. WHAT THE CHART SHOWS IS THAT, IN 1995, CIGARETTE  
17 SMOKING BY ADOLESCENTS, THAT IS, HIGH SCHOOL STUDENTS, WAS  
18 AT THE LEVEL YOU SEE, SOMEWHERE JUST ABOVE ABOUT 32, MAYBE  
19 33 PERCENT.

20 NOW, ALSO, YOU CAN SEE THAT ABOUT HALF OF THAT  
21 RISK-TAKING BEHAVIOR RELATIVE TO CIGARETTE SMOKING WAS  
22 SMOKED REGULARLY.

23 THAT'S WHAT THE LINE IS ACROSS, THE YELLOW LINE.

24 Q. DOCTOR, DO YOU MIND GOING DOWN TO --

25 A. I PROBABLY CAN READ IT EASIER.

26 Q. -- TO THE SCREEN. IT'S ACTUALLY HARD TO READ. I  
27 CAN'T SEEM TO FOCUS ON THE MACHINE TO GET IT RIGHT.

28 WHY DON'T YOU GO THROUGH THE DIFFERENT BARS.

4431

1 TELL US WHAT THEY SAY.

2 A. OUT HERE, WHAT YOU HAVE, THIS IS "ALCOHOL USE IN  
3 THE LAST 30 DAYS" (INDICATING).

4 AND IT SHOWS OVER 50 PERCENT OF HIGH SCHOOL  
5 SENIORS CONSUMED ALCOHOL IN THE LAST 30 DAYS.

6 AND HERE, WE HAVE ABOUT ONE-THIRD HAD MORE THAN  
7 FIVE DRINKS IN A SINGLE EPISODE, WHAT HAS GENERALLY BEEN  
8 DESCRIBED, AT LEAST AT MY CAMPUS, AS BINGE DRINKING.

9 Q. SO THAT'S ONE-THIRD OF ALL HIGH SCHOOL STUDENTS?

10 A. NOT ONE-THIRD OF THE HIGH SCHOOL STUDENTS WHO  
11 DRANK WITHIN THE LAST 30 DAYS. IT'S ONE-THIRD OF ALL HIGH  
12 SCHOOL STUDENTS ENGAGED IN BINGE DRINKING IN THE LAST 30  
13 DAYS.

14 Q. WHAT DOES THE NEXT BAR SAY?

15 A. THE NEXT BAR COMES IN AT ABOUT 38 PERCENT, AND  
16 IT'S -- I WILL HAVE TO LOOK AT YOUR COPY. I CAN'T READ IT.

17 Q. "RIDING"?

18 A. "RIDING WITH A DRINKING DRIVER WITHIN THE LAST 30  
19 DAYS."

20 SO WHAT WE HAVE GOT HERE IS ABOUT 38 PERCENT OF  
21 HIGH SCHOOL SENIORS WERE OUT RIDING WITH SOMEBODY WHO WAS  
22 DRINKING WHILE DRIVING.

23 Q. THE NEXT COLUMN?

24 A. THE NEXT COLUMN IS "SEXUAL INTERCOURSE IN THE  
25 LAST THREE MONTHS." THAT COMES IN AT ABOUT 37 PERCENT.

26 AND WHAT YOU SEE IS THAT ABOUT 18 TO 19 PERCENT

27 ENGAGED IN SEXUAL INTERCOURSE WITHOUT A CONDOM, WHAT HAS  
28 BEEN CALLED UNSAFE SEX. THAT IS HIGHER THAN THE AMOUNT --

4432

1 THE NUMBER WHO SMOKED REGULARLY IN THE LAST 30 DAYS.

2 Q. AND WHAT'S THE DEFINITION OF "SMOKED REGULARLY"  
3 THAT'S BEING USED IN CONNECTION WITH THIS CHART?

4 A. I BELIEVE THAT'S HAD A CIGARETTE OR A COUPLE OF  
5 CIGARETTES IN THE LASTS 30 DAYS.

6 Q. OKAY.

7 OF COURSE, THE NEXT COLUMN SAYS "CIGARETTE LAST  
8 30 DAYS"?

9 A. THAT'S CORRECT.

10 Q. THAT'S BROKEN DOWN INTO PEOPLE WHO HAVE HAD A  
11 SINGLE CIGARETTE IN THE LAST 30 DAYS, THOSE WHO HAVE SMOKED  
12 FREQUENTLY?

13 A. THAT'S CORRECT.

14 Q. "SMOKED FREQUENTLY"; THAT MEANS HOW MANY  
15 CIGARETTES IN THE LAST 30 DAYS?

16 A. I DON'T RECALL WHAT WAS USED IN THAT PERIOD OF  
17 TIME, BUT MY RECOLLECTION IS IT'S SOMEWHERE IN THE  
18 NEIGHBORHOOD OF 20.

19 Q. 20. SO THAT WOULD BE FEWER -- ONE CIGARETTE  
20 WOULD CONSTITUTE "SMOKING FREQUENTLY" UNDER THIS CHART?

21 A. YES, THAT'S CORRECT.

22 Q. WHAT DOES THE NEXT BAR SAY?

23 A. THE NEXT BAR, WHICH COMES IN AT ABOUT 25, 26  
24 PERCENT, IS THE USE OF MARIJUANA IN THE LAST 30 DAYS.

25 I HAVE GOT A LITTLE LINE ACROSS HERE AT ABOUT 9  
26 PERCENT THAT THE USE OF MARIJUANA WAS ON SCHOOL GROUNDS  
27 DURING THE LAST 30 DAYS.

28 Q. AND THEN, WHAT'S THE NEXT COLUMN?

4433

1 A. THE LAST -- THE NEXT TO THE LAST COLUMN IS  
2 "CARRIED A WEAPON IN THE LAST 30 DAYS." AND IT'S 20  
3 PERCENT OF ALL HIGH SCHOOL SENIORS.

4 Q. AND THE FINAL ONE?

5 A. THE FINAL ONE IS -- COMES IN AT ABOUT 13, 14  
6 PERCENT. IT'S "DROVE A CAR AFTER DRINKING IN THE LAST 30  
7 DAYS."

8 Q. DOCTOR, I'D LIKE TO ASK YOU A FEW MORE QUESTIONS  
9 ABOUT POLLING DATA.

10 HAVE YOU REVIEWED SOME POLLING MATERIALS  
11 REGARDING SELF-REPORTING?

12 THE COURT: EXCUSE ME. MR. ROYALE, ARE YOU WITH  
13 US?

14 JUROR NO. 14: (NO AUDIBLE RESPONSE)

15 MR. ESCHER: Q. HAVE YOU REVIEWED SOME POLLING  
16 MATERIALS REGARDING THE SELF-REPORTING OF INDIVIDUALS WITH  
17 RESPECT TO THE REASONS THAT THEY STARTED SMOKING?

18 A. YES, I HAVE.

19 Q. AND COULD YOU EXPLAIN TO THE JURY WHAT'S MEANT BY  
20 "SELF-REPORTING."

21 A. SELF-REPORTING IS THE MOST COMMON METHOD OF  
22 RESEARCH, BOTH MARKETING AND OTHERWISE, WHERE WE HAVE  
23 INDIVIDUALS, SUCH AS THE PEOPLE IN THIS ROOM, WHO WOULD  
24 REPORT AND REVEAL ON THEIR OWN WHAT THEY HAD DONE, WHAT  
25 THEIR ATTITUDE WAS AND SO FORTH.

26 Q. BASICALLY, ASKING SOMEBODY WHY THEY DID  
27 SOMETHING, AND THEY WOULD SAY WHAT IT WAS?

28 A. THAT'S CORRECT.

4434

1 Q. DO YOU CONSIDER THAT TO BE AN INHERENTLY  
2 UNRELIABLE WAY OF ACCUMULATING DATA ABOUT A POPULATION'S

3 CONDUCT?  
4 A. NO.  
5 Q. WHY NOT?  
6 A. BECAUSE, FIRST OF ALL, IT HAS BEEN SHOWN TO BE --  
7 THROUGH A LOT OF RESEARCH, TO BE VALID. IT HAS BEEN  
8 VALIDATED IN NUMEROUS INSTANCES.  
9 IT IS THE MOST WIDELY USED METHOD OF RESEARCH IN  
10 TRYING TO UNDERSTAND ATTITUDES, BEHAVIOR AND SO FORTH.  
11 IT BEGINS EARLY IN THE HISTORY OF THIS COUNTRY,  
12 IN FACT, WITH THE BEGINNING OF THE UNITED STATES CENSUS,  
13 WHICH IS SELF-REPORTING, AND GOES THROUGH ALMOST ALL OF THE  
14 DATA THAT IS RELIED UPON BY THE GOVERNMENT, BY UNIVERSITIES  
15 AND SO FORTH, IN TRYING TO UNDERSTAND BEHAVIOR, ATTITUDES,  
16 AND SO FORTH.  
17 Q. NOW, IN YOUR 35 YEARS OF ACADEMIC WORK IN THE  
18 FIELD OF MARKETING AND ADVERTISING, HAVE YOU SEEN MANY  
19 REPORTS THAT INVOLVE SELF-REPORTING WITH RESPECT TO  
20 ADVERTISING?  
21 A. YES.  
22 Q. IS THAT ACTUALLY THE MOST TYPICAL WAY THAT  
23 ADVERTISING STUDIES ARE DONE?  
24 A. I WOULD SAY IT IS, YES.  
25 Q. AND DO YOU THINK THAT THERE IS SOMETHING  
26 INHERENTLY UNRELIABLE ABOUT USING SELF-REPORTING IN THE  
27 CONTEXT OF ADVERTISING AS OPPOSED TO SOME OTHER AREA?  
28 A. NO, I DO NOT.  
4435  
1 Q. AND DO YOU THINK THAT PEOPLE IN GENERAL CAN'T  
2 ACCURATELY DETERMINE THE EFFECT THAT ADVERTISEMENTS HAVE ON  
3 THEM?  
4 A. I THINK PEOPLE CAN REPORT ACCURATELY WHAT  
5 ADVERTISING THEY HAVE SEEN, WHAT THEIR REACTION TO IT WAS.  
6 Q. AND THIS POLLING DATA THAT YOU REVIEWED, DID YOU  
7 RELY ON THAT MATERIAL IN DEVELOPING YOUR OPINIONS IN THIS  
8 CASE?  
9 A. I DID.  
10 Q. AND YOU BASED YOUR OPINIONS, IN PART, ON THAT  
11 MATERIAL?  
12 A. YES, I DID.  
13 Q. DID YOU PREPARE SOME CHARTS IN CONNECTION WITH  
14 THE POLLING DATA?  
15 A. YES.  
16 MR. ESCHER: I WILL HAVE THIS MARKED AS EXHIBIT  
17 6272.  
18 (DOCUMENT MORE PARTICULARLY  
19 LISTED IN THE INDEX MARKED  
20 FOR IDENTIFICATION DEFENDANTS'  
21 EXHIBIT # 6272)  
22 MR. ESCHER: Q. DOCTOR, IS THIS THE CHART YOU  
23 PREPARED IN CONNECTION WITH THE POLLING DATA THAT YOU  
24 REVIEWED?  
25 A. YES, IT IS.  
26 Q. AND THIS ONE, AGAIN, IS SELF-REPORTING DATA?  
27 A. THAT IS CORRECT.  
28 Q. AND THIS SHOWS THAT THE LARGEST SINGLE CATEGORY  
4436  
1 OF THE SELF-REPORTED REASON FOR SMOKING IS "DIRECT/INDIRECT  
2 PEER INFLUENCE/SOCIAL, WORK SETTING"; IS THAT RIGHT?  
3 A. THAT IS CORRECT.  
4 Q. AND "ADVERTISING" IS SHOWN AS ZERO PERCENT ON  
5 THIS?  
6 A. THAT IS CORRECT.  
7 Q. OKAY.

8 A. THIS IS FOR ADULTS.  
9 Q. THIS IS FOR ADULTS.  
10 DO WE ALSO HAVE ONE FOR MINORS?  
11 A. YES, WE DO.  
12 MR. ESCHER: THAT ONE HAS BEEN MARKED AS EXHIBIT  
13 6273.  
14 (DOCUMENT MORE PARTICULARLY  
15 LISTED IN THE INDEX MARKED  
16 FOR IDENTIFICATION DEFENDANTS'  
17 EXHIBIT # 6273)  
18 MR. ESCHER: Q. DOCTOR, IS THIS THE CHART THAT  
19 YOU HAD PREPARED IN CONNECTION WITH THE POLLING DATA WITH  
20 RESPECT TO ADOLESCENTS AND THEIR SELF-REPORTED REASONS FOR  
21 SMOKING?  
22 A. YES, IT IS.  
23 Q. AND IT SHOWS FRIENDS SMOKING IS THE BIGGEST  
24 SINGLE CATEGORY, AT 65 PERCENT?  
25 A. YES, SIR.  
26 Q. AND WHAT DOES IT SHOW FOR "FAMILY SMOKED"?  
27 A. 19 PERCENT.  
28 Q. ARE THOSE THE TWO BIGGEST SINGLE CATEGORIES?  
4437  
1 A. YES, THEY ARE.  
2 Q. IS THAT CONSISTENT WITH THE OTHER DATA THAT YOU  
3 HAVE REVIEWED AS TO THE REASONS THAT ADOLESCENTS SMOKE  
4 CIGARETTES?  
5 A. VERY MUCH.  
6 Q. AND "ADVERTISING" IS SHOWN AT ZERO PERCENT HERE;  
7 IS THAT RIGHT?  
8 A. THAT IS CORRECT.  
9 Q. THANK YOU.  
10 I'D LIKE TO TURN NOW TO THE SUBJECT OF PUBLIC  
11 RELATIONS.  
12 A. YES.  
13 Q. IS THAT A SUBJECT THAT YOU HAVE STUDIED AND  
14 TAUGHT OVER THE COURSE OF YOUR CAREER?  
15 A. YES.  
16 Q. AND OVER THE COURSE OF YOUR CAREER, HAVE YOU  
17 STUDIED THE USED OF PUBLIC RELATIONS BY BUSINESSES AND  
18 GOVERNMENT?  
19 A. YES, I HAVE.  
20 Q. AND BROADLY SPEAKING, WHAT IS "PUBLIC RELATIONS,"  
21 THE WAY YOU USE THAT TERM?  
22 A. THE WAY I USE THE TERM IS THAT PUBLIC RELATIONS  
23 IS A COMMUNICATION BETWEEN AN ORGANIZATION AND PEOPLE OUT IN  
24 THE PUBLIC THAT IS GENERALLY NOT PAID FOR AND NOT IN A  
25 PAID-FOR MEDIUM.  
26 Q. AND IS THE USE OF PUBLIC RELATIONS COMMON IN THE  
27 BUSINESS COMMUNITY?  
28 A. VERY MUCH SO.  
4438  
1 Q. HOW ABOUT IN GOVERNMENT?  
2 A. IT IS COMMON IN GOVERNMENT AND IT IS COMMON IN MY  
3 UNIVERSITY, AS A GOVERNMENT ENTITY.  
4 Q. SO WHY IS PUBLIC RELATIONS COMMONLY USED BY BOTH  
5 GOVERNMENT AND BUSINESS?  
6 A. IT IS ANOTHER DEVICE OR ANOTHER WAY OF  
7 COMMUNICATING TO THE MARKET. IT IS A WAY OF PROVIDING  
8 INFORMATION TO PEOPLE THAT WE WANT TO PROVIDE. IN SOME  
9 CASES, THE PROVIDING OF INFORMATION BY, FOR INSTANCE  
10 EDUCATIONAL INSTITUTIONS, CHARITABLE INSTITUTIONS. PUBLIC  
11 RELATIONS IS USED AS AN EFFORT TO RAISE MONEY.  
12 Q. LET'S GO BACK IN TIME A LITTLE BIT TO BEFORE YOU



13 WERE A MARKETING PERSON, BACK TO WHEN YOU WERE A NEWSMAN.  
14 DO YOU REMEMBER THAT?  
15 A. YES, I DO.  
16 Q. AND YOU SAID THAT YOU ACTUALLY ACTED AS AN ANCHOR  
17 PERSON IN CONNECTION WITH TELEVISION NEWS PROGRAMS?  
18 A. YES.  
19 Q. AND DID YOU WORK IN RADIO AS WELL?  
20 A. OH, YES.  
21 Q. AND WHAT WAS THE TIME FRAME OF WHICH YOU WERE A  
22 NEWSMAN, FROM WHEN TO WHEN?  
23 A. I STARTED IN BROADCASTING IN 1951. SO LET ME  
24 SEE. I WOULD THINK THAT I COULD CORRECTLY SAY I WAS A  
25 WORKING NEWSMAN ABOUT NINE TO 10 MONTHS AFTER THAT.  
26 IN THE EARLY DAYS, I WAS DOING MORE ANNOUNCING  
27 AND LESS NEWS WORK, ALTHOUGH READING NEWS.  
28 AT THAT POINT IN TIME, IN 1952, I BEGAN TO WORK  
4439  
1 AS A WORKING NEWSMAN.  
2 Q. BUT YOU REPORTED NEWS BOTH ON RADIO AND ON  
3 TELEVISION; IS THAT RIGHT?  
4 A. NOT ONLY -- YES, DURING THAT PERIOD OF TIME UP  
5 UNTIL 1965.  
6 Q. UNTIL 1965?  
7 A. YES.  
8 Q. THAT WOULD BE AFTER THE SURGEON GENERAL'S REPORT;  
9 RIGHT?  
10 A. THAT IS CORRECT.  
11 Q. NOW, DOCTOR, DID YOU PERSONALLY REPORT ON SMOKING  
12 AND HEALTH STORIES DURING THAT TIME PERIOD?  
13 A. OH, YES.  
14 Q. AND ON TELEVISION?  
15 A. YES.  
16 Q. AND ON RADIO?  
17 A. OH, YES.  
18 Q. AND THAT HAPPENED MORE THAN ONCE?  
19 A. OH, YES. IT WAS WHAT YOU WOULD CALL A BIG STORY,  
20 AND A CONTINUING BIG STORY.  
21 Q. AND GENERALLY, WHAT SUBJECTS WERE COVERED BY THIS  
22 CONTINUING BIG STORY?  
23 A. WELL, THE CONTINUING BIG STORY, WHICH ONE OF THE  
24 MAJOR HIGHLIGHTS THAT I STILL CAN RECALL, THE MOUSE-TRACKING  
25 STUDIES THAT WERE IN THE READER'S DIGEST.  
26 BUT IT WAS THE -- THERE WAS A -- THERE WAS  
27 EVIDENCE, OR AT LEAST THE BEGINNING OF EVIDENCE TO INDICATE  
28 THAT THERE WAS A SERIOUS HEALTH RISK ASSOCIATED WITH  
4440  
1 CIGARETTE SMOKING.  
2 Q. AND DO YOU RECALL PERSONALLY REPORTING ON THE  
3 1964 SURGEON GENERAL'S REPORT?  
4 A. YES.  
5 Q. WAS ANY EFFORT MADE BY ANYONE TO INFLUENCE YOU IN  
6 HOW YOU REPORTED THOSE NEWS ITEMS?  
7 A. OH, NO.  
8 Q. AND WAS CIGARETTE ADVERTISING CARRIED ON SOME OF  
9 THE BROADCAST STATIONS YOU WORKED FOR?  
10 A. SURE.  
11 Q. BUT NOBODY TRIED TO INFLUENCE YOU TO DOWNPLAY THE  
12 DANGER OF SMOKING IN YOUR NEWS PRESENTATIONS, DID THEY?  
13 A. NO. AS A TELEVISION NEWS DIRECTOR, THAT WAS ONE  
14 OF THOSE THINGS THAT WAS TIGHTLY GUARDED AGAINST.  
15 Q. DO YOU REMEMBER THE FRANK STATEMENT TO CIGARETTE  
16 SMOKERS OF 1954?  
17 A. YES, I DO.

18 Q. DID YOU REPORT ON THAT?  
19 A. WELL, WE WERE REPORTED ON IT IN THE SENSE THAT IT  
20 HAD BEEN ISSUED. IT WAS AN ADVERTISEMENT.  
21 BUT MY RECOLLECTION WAS ALONG THE LINES THAT WE  
22 DIDN'T NECESSARILY REPORT ON THE CONTENT OF THE FRANK  
23 STATEMENT, BUT RATHER REPORTED ON THE UNIQUENESS OF AN  
24 INDUSTRY COMING OUT AND SAYING, "WELL, WE UNDERSTAND THAT  
25 THERE IS A CONTROVERSY OVER THIS."  
26 THAT WAS SOMEWHAT UNIQUE, AND SO THAT WAS WHAT WE  
27 REPORTED ON.  
28 Q. I'D LIKE TO TURN NOW TO YOUR WORK IN THE  
4441  
1 TELEVISION INDUSTRY IN THE 1960S.  
2 YOU WERE WORKING IN TELEVISION DURING THE FIRST  
3 PART OF THE 1960S?  
4 A. YES, I WAS.  
5 Q. DID YOU EVER HEAR THE TERM "ROADBLOCKING" DURING  
6 THAT TIME PERIOD?  
7 A. NO, NOT DURING THAT TIME PERIOD.  
8 I'VE HEARD IT SINCE, NOT DURING THAT TIME PERIOD.  
9 Q. SO WHEN DID YOU HEAR IT?  
10 A. WELL, I HEARD IT RECENTLY, WHERE THERE'S BEEN  
11 ATTEMPTS AT WHAT IS CALLED ROADBLOCKING.  
12 Q. ON TELEVISION NOW?  
13 A. WELL, THERE HAVE BEEN ATTEMPTS, ALTHOUGH MY  
14 UNDERSTANDING IS NOT VERY SUCCESSFUL.  
15 Q. AND FROM THE TIME PERIOD THAT YOU WERE WORKING IN  
16 TELEVISION IN THE EARLY 1960S, DID YOU EVER SEE AN EXAMPLE  
17 OF ROADBLOCKING DURING THAT TIME PERIOD?  
18 A. NO. AND IT WAS NOT A CONCEPT THAT ANYBODY HAD  
19 EVER DISCUSSED OR WAS PREVALENT DURING THAT TIME PERIOD.  
20 Q. DID YOU SEE THE FLINTSTONES WHEN IT CAME OUT IN  
21 1960?  
22 A. I REMEMBER IT VERY WELL. I WAS WORKING ON ABC  
23 WHEN IT WENT ON THE AIR.  
24 Q. WAS THE FLINTSTONES ON ABC?  
25 A. YES, IT WAS. IT WENT ON AT 8:30 AT NIGHT.  
26 Q. AND DID YOU HAVE CHILDREN AT THAT POINT IN TIME?  
27 A. YES.  
28 Q. HOW MANY?  
4442  
1 A. LET ME SEE NOW. YOU HAVE -- YOU'RE TESTING ME.  
2 I'M SORRY. LET'S SEE. TWO.  
3 Q. TWO?  
4 A. YES.  
5 Q. AND DID THEY GO TO BED BEFORE 8:30?  
6 A. OH, YES.  
7 Q. BUT YOU WATCHED IT AT 8:30?  
8 A. WELL, I WATCHED IT FOR AWHILE. I WILL CONFESS I  
9 DIDN'T FIND IT OVERLY INTERESTING. IT WAS AN ADULT CARTOON,  
10 BUT I DIDN'T FIND IT OVERLY INTERESTING.  
11 Q. FROM WORKING IN TELEVISION AT THAT TIME, WAS  
12 THERE CONTROVERSY ABOUT WHETHER AN ADULT CARTOON WOULD  
13 ACTUALLY SUCCEED IN THE MARKET?  
14 A. THAT WAS A BIG CONTROVERSY. EVERYBODY WAS  
15 WONDERING WHETHER OR NOT YOU COULD TAKE A CARTOON FORMAT AND  
16 HAVE ADULTS WATCH IT ON A REGULAR BASIS. AND THAT WAS --  
17 THAT WAS THE BIG -- THAT WAS THE BIG THING ABOUT THE  
18 FLINTSTONES.  
19 Q. I'D LIKE TO TALK TO YOU A LITTLE BIT ABOUT WHEN  
20 MOST PEOPLE BECOME REGULAR SMOKERS WHO DID BECOME SMOKERS.  
21 HAVE YOU PERSONALLY EXAMINED DATA ON THE SUBJECT  
22 OF THE AGE WHEN PEOPLE START SMOKING?

23 A. YES.  
24 Q. AND BY "START," WHAT DO YOU MEAN?  
25 A. WELL, THAT'S A DIFFICULT TERM. THERE ARE SO MANY  
26 DIFFERENT DEFINITIONS OF SMOKING.  
27 WHEN I LOOK AT THE CDC DATA, THERE'S JUST A  
28 MYRIAD OF DEFINITIONS PEOPLE HAVE.

4443

1 SO START SMOKING COULD BE WHEN SOMEBODY JUST  
2 EXPERIMENTED WITH THEIR FIRST CIGARETTE. THEN, DOES IT MEAN  
3 THAT YOU START OCCASIONALLY SMOKING OR DOES IT START  
4 REGULARLY SMOKING? WHAT DO YOU MEAN BY "OCCASIONAL" AND  
5 "REGULAR"?

6 THERE'S A LOT OF DIFFERENT DEFINITIONS THAT I  
7 HAVE JUST SEEN IN THE LITERATURE CONCERNING ALL OF THOSE.

8 Q. SO THERE'S NOT A CONSISTENT DEFINITION OVER THE  
9 VARIOUS ARTICLES THAT YOU HAVE REVIEWED?

10 A. NO, THERE REALLY IS NOT.

11 Q. ARE YOU FAMILIAR WITH THE CLAIM THAT MINORS ARE  
12 MORE INFLUENCED BY CIGARETTE ADVERTISING THAN ADULTS ARE?

13 A. I'VE HEARD THAT.

14 Q. AND HAVE YOU LOOKED INTO THAT SUBJECT YOURSELF?

15 A. WELL, I HAVE SEEN SOME MATERIAL ON IT, YES.

16 Q. AND THE MATERIAL THAT YOU HAVE SEEN, WHERE WAS  
17 THAT?

18 A. THAT WAS -- OH, I'M TRYING TO THINK OF WHAT THE  
19 REFERENCE POINT ON WHAT THAT ONE WAS. FOR THE MOMENT, IT  
20 ESCAPES ME.

21 I CAN REMEMBER WHAT I SAW, BUT I CAN'T REMEMBER  
22 THE EXACT REFERENCE POINT.

23 Q. HAVE YOU GIVEN THAT SUBJECT SOME THOUGHT  
24 YOURSELF?

25 A. YES, I HAVE.

26 Q. AND DO YOU AGREE WITH THE PROPOSITION THAT MINORS  
27 ARE MORE INFLUENCED BY CIGARETTE ADVERTISING THAN ADULTS  
28 ARE?

4444

1 A. NO, I THINK THE CONSENSUS IS THAT, EARLY IN LIFE,  
2 OR AT LEAST WHAT I THINK IS EARLY IN LIFE, MINORS ESTABLISH  
3 A REAL SUSPICION, IF YOU WANT, ABOUT ADVERTISING, THAT THEY  
4 RECOGNIZE WHAT ADVERTISING -- WHY PEOPLE ARE ADVERTISING AT  
5 THEM, AND THAT THEY RECOGNIZE OR HAVE A KIND OF -- THEY  
6 DON'T TRUST THEM.

7 MS. CHABER: YOUR HONOR, I WOULD MOVE TO STRIKE.  
8 THE QUESTION WAS: "DO YOU AGREE WITH THAT?" AND  
9 WE STARTED GETTING OFF ON CONSENSUS OF OPINION.

10 THE COURT: I WILL SUSTAIN AND STRIKE THE  
11 ANSWER, BECAUSE I CAN'T SEPARATE OUT THE RESPONSIVE PART  
12 FROM THE NONRESPONSIVE PART. IT'S WITHOUT PREJUDICE TO YOUR  
13 REASKING THE QUESTION.

14 MR. ESCHER: Q. DOCTOR, HAVE YOU STUDIED THE  
15 ISSUE OF WHETHER ADOLESCENTS ARE MORE VULNERABLE TO  
16 ADVERTISING THAN ADULTS ARE?

17 A. I HAVE NOT PERSONALLY STUDIED IT, BUT I HAVE  
18 LOOKED AT THE LITERATURE CONCERNING THAT.

19 Q. AND HAVE YOU PREPARED A CHART IN CONNECTION WITH  
20 YOUR REVIEW OF THE LITERATURE ON THAT SUBJECT?

21 A. YES, I HAVE.

22 MR. ESCHER: YOUR HONOR, WE'LL MARK THIS AS  
23 6274.

24 MS. CHABER: YOUR HONOR, WE DO HAVE AN  
25 EVIDENTIARY ISSUE THAT WE'D LIKE TO DISCUSS AT SIDEBAR. IT  
26 SHOULDN'T TAKE LONG.

27 THE COURT: ALL RIGHT. LET'S DO IT REAL

28 QUICKLY.  
4445  
1 MS. CHABER: AT THE BREAK?  
2 THE COURT: YOU KNOW WHAT? I'D RATHER GO 10 OR  
3 15 MORE MINUTES AND JUST TAKE ONE AFTERNOON BREAK.  
4 I MIGHT HAVE SOME RESPONSIBILITIES AS THE ACTING  
5 PRESIDING JUDGE, WHICH I'M GOING TO WAIT UNTIL I GET THE  
6 WORD THAT I NEED TO DO THAT.  
7 I'D LIKE TO GO FOR 10, 15 MORE MINUTES. LET ME  
8 DO A VERY QUICK SIDEBAR WITH YOU.  
9 (COURT AND COUNSEL CONFER OUTSIDE  
10 THE PRESENCE OF THE JURY)  
11 THE COURT: FOR THE RECORD, YOU ARE NOT GOING TO  
12 MARK THAT DOCUMENT?  
13 MR. ESCHER: I'M NOT GOING TO MARK IT. I HAVE  
14 TAKEN THE STICKER OFF.  
15 THE COURT: SO THAT NUMBER HASN'T BEEN USED YET.  
16 MR. ESCHER: Q. HAVE YOU REVIEWED AN ARTICLE  
17 AUTHORED BY ROBINSON AND ROSSITER WITH THE TITLE, "CHILDREN  
18 AND COMMERCIAL PERSUASION: AN ATTRIBUTION THEORY ANALYSIS"?  
19 A. YES, I HAVE.  
20 Q. WHAT IS AN ATTRIBUTION THEORY?  
21 A. IT IS THE THEORY OF WHAT WE ATTRIBUTE SOMETHING  
22 TO, THE BEST I UNDERSTAND IT.  
23 Q. IN THE CONTEXT OF ADVERTISING, WHAT WOULD THAT  
24 MEAN?  
25 A. WHAT WE WOULD ATTRIBUTE OUR BEHAVIOR TO  
26 ADVERTISING.  
27 Q. AND THE ARTICLE AUTHORED BY ROBERTSON AND  
28 ROSSITER, DID THAT RESEARCH CHILDREN AT PARTICULAR AGES WITH  
4446  
1 RESPECT TO THEIR UNDERSTANDING ABOUT THE EFFECTS OF  
2 ADVERTISING?  
3 A. YES, IT DID.  
4 Q. AND DID THAT STUDY SUPPORT YOUR CONCLUSION IN  
5 THIS CASE THAT CHILDREN DO, IN FACT, UNDERSTAND THE MEANING  
6 AND IMPORT OF ADVERTISING?  
7 MS. CHABER: OBJECTION, YOUR HONOR. THE  
8 CONTENTS OF.  
9 THE COURT: IT DOES. AND I'LL SUSTAIN.  
10 WOULD YOU REPHRASE THE QUESTION.  
11 MR. ESCHER: I WILL TRY IT AGAIN, YOUR HONOR.  
12 Q. DO YOU CONCLUDE FROM THIS ARTICLE THAT YOUNG  
13 CHILDREN UNDERSTAND THE PURPOSES OF ADVERTISING?  
14 A. YES.  
15 Q. AND THAT THAT UNDERSTANDING DEVELOPS OVER TIME  
16 AND IS DEVELOPED BY AN EARLY AGE?  
17 A. YES.  
18 Q. NOW, DOCTOR, BASED ON YOUR REVIEW OF THE EVIDENCE  
19 THAT YOU HAVE REVIEWED AND THAT WE HAVE DISCUSSED TODAY, DO  
20 YOU HAVE AN OPINION AS TO THE IMPACT OF CIGARETTE MARKETING  
21 COMMUNICATIONS ON SMOKING INITIATION BY UNDERAGE SMOKERS?  
22 A. YES, SIR.  
23 Q. AND WHAT IS THAT OPINION?  
24 A. THAT THERE IS NO -- THERE IS NO ASSOCIATION  
25 BETWEEN MARKETING ACTIVITIES -- MARKETING COMMUNICATION AND  
26 INITIATION OF SMOKING BY ADOLESCENTS.  
27 Q. AND IS YOUR OPINION ANY DIFFERENT AS IT RELATES  
28 TO ADULTS?  
4447  
1 A. NO.  
2 Q. AND IS YOUR OPINION ANY DIFFERENT AS IT RELATES  
3 TO LESLIE WHITELEY?

4 A. NO.  
5 MR. ESCHER: OKAY. I DON'T HAVE ANY FURTHER  
6 QUESTIONS.  
7 THANK YOU.  
8 THE COURT: OKAY. ANY OTHER DEFENSE COUNSEL  
9 HAVE ANY QUESTIONS FOR DR. MARTIN?  
10 MR. HARDY: NO, YOUR HONOR.  
11 THE COURT: MS. CHABER.  
12 MS. CHABER: I THOUGHT IT WOULD BE AT THE  
13 BREAK.  
14 THE COURT: LET'S TAKE A BREAK THEN.  
15 LET ME ASK YOU, IF WE TAKE 20 MINUTES, WILL WE  
16 FINISH WITH DR. MARTIN TODAY? IS THAT GOING TO BE CLOSE?  
17 MS. CHABER: I THINK IT'S GOING TO BE CLOSE,  
18 WHETHER WE TAKE THE BREAK OR NOT.  
19 THE COURT: OKAY. BUT THEN, BECAUSE OF MY  
20 CONCERN THAT I'M GOING TO HAVE TO TAKE A BREAK LATER, LET'S  
21 GO AHEAD AND GET THE MATERIALS NOW.  
22 MS. CHABER: OKAY. IT WILL JUST TAKE A SECOND.  
23 MS. CHABER: READY, YOUR HONOR?  
24 THE COURT: YES, I AM READY.

25  
26 CROSS-EXAMINATION  
27 BY MS. CHABER: Q. GOOD AFTERNOON, DR.  
28 MARTIN.  
4448

1 A. GOOD AFTERNOON.  
2 Q. WE'VE MET VERY RECENTLY; RIGHT?  
3 A. YES. I RECALL IT WAS MONDAY AFTERNOON.  
4 Q. MONDAY AFTERNOON, I GOT TO TAKE YOUR DEPOSITION  
5 AND FIND OUT A LITTLE BIT ABOUT YOU?  
6 A. THAT'S CORRECT. AND I LEARNED ABOUT YOU.  
7 Q. WE BETTER NOT GO ANY FURTHER THAN THAT.  
8 DOCTOR, YOU'RE NOT HERE IN ANY CAPACITY FROM THE  
9 UNIVERSITY, ARE YOU?  
10 A. NO. I'M NOT REPRESENTING THE UNIVERSITY, NO.  
11 Q. AND THE MONEYS THAT YOU EARN IN DOING THIS WORK  
12 ARE NOT MONEYS THAT GO TO THE UNIVERSITY, ARE THEY?  
13 A. THAT'S CORRECT.  
14 Q. THOSE ARE MONEYS THAT ARE YOUR PERSONAL INCOME?  
15 A. THEY'RE AMONG MY PERSONAL INCOME.  
16 Q. HOPEFULLY, YOU MAKE MONEY OTHER WAYS, DOCTOR.  
17 YOU CHARGE -- IS IT \$3,000 A DAY FOR YOUR WORK IN  
18 LITIGATION CASES SUCH AS THIS?  
19 A. NO, THAT'S NOT TRUE.  
20 Q. YOU CHARGE \$375 AN HOUR TO COME TESTIFY IN COURT?  
21 A. IN TESTIFYING IN COURT, YES.  
22 Q. AND A MINIMUM OF EIGHT HOURS FOR A DAY?  
23 A. YES, THAT'S TRUE.  
24 Q. SO THAT IF YOU CAME AND YOU TESTIFIED FOR ONE  
25 HOUR, YOU WOULD STILL BE PAID EIGHT HOURS; CORRECT?  
26 A. YEAH, I GUESS THAT WOULD BE TRUE. MM-HMM.  
27 Q. AND YOU ALSO, OBVIOUSLY, CHARGE FOR YOUR TIME IN  
28 CONSULTATION?

4449  
1 A. CORRECT.  
2 Q. AND I THINK UP UNTIL, MONDAY WHEN WE MET, YOU HAD  
3 ESTIMATED THAT YOU HAD SPENT ABOUT 50 HOURS IN PREPARING FOR  
4 THIS CASE?  
5 A. THAT WAS AN ESTIMATE ON MY PART.  
6 Q. AND IS THAT A REASONABLE ESTIMATE?  
7 A. I'M TRYING TO THINK OF WHETHER IT IS OR ISN'T. I  
8 THINK THAT'S PRETTY -- IT'S THE BEST I CAN DO, YES.

9 Q. AND YOU'VE SPENT ADDITIONAL TIME SINCE THEN, HAVE  
10 YOU NOT?  
11 A. SOME.  
12 Q. WELL, YOU SPENT YESTERDAY MEETING WITH MR. ESCHER  
13 AND GOING OVER THE TESTIMONY THAT YOU WERE GOING TO BE  
14 PRESENTING HERE TODAY; CORRECT?  
15 A. WE SPENT A COUPLE OF HOURS.  
16 Q. AND WAS IT LESS THAN EIGHT?  
17 A. YES.  
18 Q. YOU CHARGED FOR EIGHT, THOUGH?  
19 A. I HAVEN'T CHARGED FOR ANYTHING YET.  
20 Q. BUT YOU WILL?  
21 A. WELL, I'M THINKING ABOUT IT.  
22 I DID SIT OUT HERE IN THE HALLWAY FOR MOST OF THE  
23 EIGHT HOURS. YES, I WAS PREPARED TO COME IN HERE.  
24 Q. YOU GOT A NICE VIEW OF OUR NEWLY RENOVATED CITY  
25 HALL.  
26 A. WELL, I GOT A NICE VIEW AND IT BROUGHT BACK HAPPY  
27 MEMORIES TO BE, BECAUSE THIS IS WHERE I WAS DISCHARGED FROM  
28 THE SERVICE.

4450

1 Q. YOU GOT INVOLVED INITIALLY IN TOBACCO-RELATED  
2 LITIGATION MATTERS IN THE 1980S?  
3 A. YES, IN TOBACCO LITIGATION IN THE 19 -- LATE  
4 1980S.  
5 Q. LATE 1980S.  
6 AND THAT INVOLVED A CASE IN NEW JERSEY?  
7 A. THAT'S CORRECT.  
8 Q. AND IT WAS A CASE THAT WENT ON FOR A LONG TIME,  
9 DIDN'T IT?  
10 A. YES, I GUESS IT DID. MY RECOLLECTION WAS IT WAS  
11 QUITE A BIT OF TIME, YES.  
12 Q. YOU SPENT ALMOST TWO YEARS ON THAT CASE, DIDN'T  
13 YOU? NOT EVERY MOMENT OF YOUR TIME, OBVIOUSLY, BUT OVER A  
14 TWO-YEAR TIME PERIOD, YOU WORKED ON THAT CASE?  
15 A. FROM THE TIME I WAS RETAINED UNTIL THE TIME IT  
16 WENT TO TRIAL, YEAH, I WOULD THINK IT WAS SOMEWHERE IN THE  
17 NEIGHBORHOOD OF TWO YEARS, OFF AND ON.  
18 Q. AND I THINK YOU BILLED SOMEWHERE AROUND \$50,000?  
19 A. I THINK THAT WAS THE TOTAL BILLING OVER THAT  
20 WHOLE PERIOD OF TIME.  
21 Q. AND THAT WAS JUST -- I MEAN, YOU WERE DOING OTHER  
22 WORK AND MAKING OTHER MONEY; CORRECT?  
23 A. I WAS DOING OTHER WORK, YES. I WAS BEING PAID BY  
24 THE UNIVERSITY, IN FACT.  
25 Q. OKAY. AND THIS 50,000, WHEN YOU WERE TAKING THIS  
26 TIME TO DO THAT, YOU DIDN'T DONATE THAT TO THE RESEARCH  
27 PROGRAMS AT THE UNIVERSITY OR TO FUND A SCHOLARSHIP FOR ANY  
28 OF YOUR STUDENTS, DID YOU?

4451

1 A. NO. I JUST PAID OFF SOME OF THE TUITION BILLS  
2 THAT I OWED FOR MY CHILDREN TO GO TO COLLEGE.  
3 Q. AND, SIR, AT THE TIME THAT YOU FIRST TESTIFIED IN  
4 19 -- IN THE LATE 1980S IN THE CASE IN NEW JERSEY, YOU HAD  
5 PUBLISHED NO ARTICLES, BOOKS OR OTHER PUBLICATIONS ON  
6 SMOKING, HAD YOU?  
7 A. NO.  
8 Q. AND YOU HAVE THEN DONE WORK ON TOBACCO LITIGATION  
9 MATTERS BEGINNING AGAIN IN THE LATE -- IN LATE 1996?  
10 A. I BELIEVE THAT'S WHEN THE PERIOD OF TIME WAS,  
11 YES.  
12 Q. AND SINCE THAT TIME, FROM '96 UNTIL THE PRESENT,  
13 YOU HAVE BEEN ON RETAINER FOR LAW FIRMS REPRESENTING R.J.

14 REYNOLDS AND PHILIP MORRIS AND OTHER TOBACCO COMPANIES?  
15 A. NO. I HAVE NOT BEEN ON A RETAINER, FIRST.  
16 AND SECOND, I HAD NO RELATION WITH LAW FIRMS THAT  
17 I KNOW OF THAT REPRESENT PHILIP MORRIS.  
18 Q. OKAY. YOU HAVE DONE WORK AND HAVE BEEN HIRED BY  
19 A LAW FIRM AT LEAST REPRESENTING R.J. REYNOLDS; CORRECT?  
20 A. YES, THAT'S CORRECT.  
21 Q. AND YOU HAVE BEEN INVOLVED IN OTHER CASES BESIDES  
22 THE CASE IN THE LATE 1980S AND BESIDES THIS ONE; CORRECT?  
23 A. YES, THAT'S CORRECT.  
24 Q. YOU WERE INVOLVED IN A CASE IN FLORIDA?  
25 A. INVOLVED IN THE SENSE THAT I GAVE A DEPOSITION,  
26 YES.  
27 Q. WELL, I ASSUME THAT YOU DID PREPARATION AND MET  
28 AND CONSULTED WITH THE LAWYERS BEFORE YOU GAVE YOUR  
4452  
1 DEPOSITION?  
2 A. YES. SURE.  
3 Q. AND YOU DID PREPARATORY WORK, AND I ASSUME YOU  
4 BILLED FOR THAT WORK?  
5 A. YES, THAT'S RIGHT.  
6 Q. AND THAT WAS A CASE INVOLVING MORE THAN ONE  
7 PLAINTIFF; CORRECT?  
8 A. MY RECOLLECTION, THE ONLY NAME I EVER HEARD OF IN  
9 THAT CASE -- I DID NOTHING OTHER THAN THE DEPOSITION IN THE  
10 SENSE OF TESTIFYING OR ANYTHING -- WAS THE NAME ENGLE.  
11 I KNOW -- I DON'T KNOW. I CAN'T RECALL THE OTHER  
12 NAMES ASSOCIATED WITH IT, IF THERE WERE ANY.  
13 Q. YOU DID THINGS LIKE READ THE COMPLAINT AND READ  
14 DEPOSITIONS AND SO FORTH IN ORDER TO PREPARE TO GIVE  
15 TESTIMONY; CORRECT?  
16 A. THAT'S CORRECT.  
17 Q. I MEAN, YOU WERE PREPARED TO GIVE TESTIMONY,  
18 WEREN'T YOU?  
19 A. OH, I DON'T THINK I WAS COMPLETELY PREPARED TO  
20 GIVE TESTIMONY. I THINK I HAD PREPARED ENOUGH TO GIVE A  
21 DEPOSITION, BUT I HAD NOT DONE ANY WORK FOR TRIAL TESTIMONY.  
22 Q. BUT YOU EXPECTED THAT YOU WOULD BE CALLED FOR  
23 TRIAL, DID YOU NOT?  
24 A. I WASN'T SURE. QUITE FRANKLY, I NEVER RECEIVED  
25 ANY --  
26 Q. INVITATION?  
27 A. -- KIND OF STRONG ASSURANCE THAT I WAS GOING TO  
28 BE ASKED TO COME.  
4453  
1 Q. YOU DIDN'T RECEIVE AN INVITATION TO COME TO  
2 TESTIFY IN THAT TRIAL, DID YOU?  
3 A. NO. I UNDERSTAND THE TRIAL IS STILL GOING ON.  
4 BUT THERE HASN'T BEEN AN INVITATION IN THE MAIL  
5 YET, SO I GUESS I'M NOT GOING.  
6 Q. ABOUT A YEAR?  
7 A. IN TRIAL?  
8 Q. YES.  
9 A. I DIDN'T KNOW THAT. I JUST READ ABOUT IT THE  
10 OTHER DAY IN THE PAPER.  
11 Q. DOCTOR, DO YOU KNOW HOW MANY HOURS AND HOW MUCH  
12 YOU BILLED FOR YOUR WORK IN THAT CASE?  
13 A. NO, I CAN'T REMEMBER. IT WASN'T VERY MUCH. I  
14 KNOW THAT.  
15 Q. YOU THINK YOU DID MORE PREPARATION FOR THIS CASE  
16 THAN YOU DID FOR THE ENGLE CASE?  
17 A. YES.  
18 Q. AND SO IT WAS SOMEWHERE LESS THAN 50 HOURS, BUT

19 YOU CAN'T APPROXIMATE?  
20 A. NO, I CAN'T APPROXIMATE. THAT'S A WHILE AGO.  
21 Q. OKAY. THAT WAS 1998, WASN'T IT?  
22 A. I BELIEVE SO.  
23 Q. NOW, THE CASE IN NEW JERSEY, YOU GAVE BOTH A  
24 DEPOSITION AND TESTIFIED IN TRIAL?  
25 A. YES. AND TECHNICALLY, I GAVE THREE DAYS, THREE  
26 DIFFERENT DEPOSITIONS, AND THEN TESTIFIED AT TRIAL.  
27 Q. AND YOU ALSO HAD YOUR DEPOSITION TAKEN IN  
28 MISSISSIPPI, I BELIEVE?  
4454  
1 A. YES. IN CONJUNCTION -- ACTUALLY TAKEN IN ANN  
2 ARBOR, BUT IT WAS THE CASE OF THE ATTORNEY GENERAL OF  
3 MISSISSIPPI.  
4 Q. OKAY. YOU WEREN'T ASKED TO BE THERE BY THE  
5 ATTORNEY GENERAL, WERE YOU?  
6 A. NO. NO. NO, I WAS ASKED TO BE THERE BY R.J.  
7 REYNOLDS TOBACCO COMPANY.  
8 Q. YOU WERE ASKED TO BE THERE BY R.J. REYNOLDS  
9 TOBACCO COMPANY TO TESTIFY THAT, BASICALLY, ALL OF THE MONEY  
10 THAT R.J. REYNOLDS AND THE OTHER CIGARETTE COMPANIES SPEND  
11 ON ADVERTISING HAS ZERO EFFECT IN GETTING PEOPLE TO SMOKE  
12 CIGARETTES; CORRECT?  
13 A. NO. THAT WASN'T MY OBJECTIVE.  
14 MY OBJECTIVE WAS TO COME IN AND TESTIFY TO WHAT  
15 WERE THE FACTORS ASSOCIATED WITH SMOKING INITIATION, WHAT  
16 WAS THE ROLE OF ADVERTISING IN SMOKING BEHAVIOR. GENERALLY,  
17 THE SAME THINGS THAT I TALKED ABOUT HERE THAT I WAS GOING TO  
18 TESTIFY ABOUT.  
19 Q. AND, DOCTOR, IF I'M CORRECT, WHEN YOU GET TO THE  
20 BOTTOM LINE OF YOUR OPINION, THE BOTTOM LINE OF THAT OPINION  
21 IS THAT, IN SPITE OF THE -- IS IT MILLIONS OR IS IT BILLIONS  
22 OF DOLLARS THAT THE CIGARETTE COMPANIES SPEND ON ADVERTISING  
23 EVERY YEAR?  
24 A. I BELIEVE IT'S MILLIONS.  
25 Q. -- MILLIONS OF DOLLARS THAT THEY SPEND ON  
26 ADVERTISING EVERY YEAR, THAT ADVERTISING HAS NO EFFECT ON  
27 EITHER ADULTS OR CHILDREN; IS THAT CORRECT?  
28 A. NO, I DIDN'T SAY THAT.  
4455  
1 Q. YOU THINK ADVERTISING HAS SOME EFFECT ON SOME  
2 PEOPLE; CORRECT?  
3 A. THAT IS CORRECT.  
4 Q. AND HOW MUCH DID R.J. REYNOLDS SPEND ON  
5 ADVERTISING LAST YEAR, DOCTOR?  
6 A. I DON'T KNOW. I'M NOT PRIVY TO THAT  
7 INFORMATION. IT'S NOT PUBLIC INFORMATION.  
8 Q. YOU'VE BEEN HIRED BY THE ATTORNEYS REPRESENTING  
9 R.J. REYNOLDS TO TESTIFY ABOUT ADVERTISING AND YOU'VE  
10 TESTIFIED ABOUT ADVERTISING EXPENDITURE.  
11 HAVE YOU EVER ASKED THEM HOW MUCH MONEY THEY  
12 SPENT ON ADVERTISING LAST YEAR?  
13 A. NO, I DID NOT ASK THE PEOPLE AT R.J. REYNOLDS HOW  
14 MUCH MONEY THEY SPENT ON ADVERTISING LAST YEAR.  
15 Q. THE YEAR BEFORE?  
16 A. NO.  
17 Q. ANY YEAR?  
18 A. NO.  
19 Q. HAVE YOU LOOKED AT ANY DATA ANYWHERE REPORTED BY  
20 ANY ORGANIZATIONS, BE IT GOVERNMENT OR OTHER ORGANIZATIONS,  
21 THAT GIVE THE INFORMATION ABOUT HOW MUCH MONEY R.J.  
22 REYNOLDS, OR ANY OTHER TOBACCO COMPANY, FOR THAT MATTER,  
23 SPENT ON ADVERTISING IN ANY PARTICULAR YEAR?



24 A. YES, I HAVE LOOKED AT THAT DATA IN THE AGGREGATE,  
25 AS IT'S BEEN REPORTED TO THE FEDERAL TRADE COMMISSION.  
26 Q. AND DID YOU LOOK AT THAT DATA FOR LAST YEAR?  
27 A. FOR THE FEDERAL TRADE COMMISSION?  
28 Q. YES.

4456  
1 A. I BELIEVE I HAVE SEEN IT. COME TO THINK, NO.  
2 Q. DID YOU LOOK --  
3 A. NO. WAIT A MINUTE. I'M SORRY. I APOLOGIZE FOR  
4 THAT. I DON'T BELIEVE IT IS AVAILABLE YET. I DON'T BELIEVE  
5 THE FTC HAS RELEASED THAT DATA YET.  
6 Q. I APOLOGIZE FOR SPEAKING AT THE SAME TIME THAT  
7 YOU WERE. IT'S BEEN A DISEASE THAT HAS SPREAD IN THIS  
8 COURTROOM AND I'M NOW SUFFERING FROM IT.  
9 DID YOU LOOK AT THAT INFORMATION AS TO HOW MUCH  
10 THE CIGARETTE COMPANIES SPENT IN THE AGGREGATE FOR  
11 ADVERTISING FOR THE YEAR BEFORE LAST, 1998?  
12 A. AGAIN, MY RECOLLECTION IS THAT IT MAY NOT EVEN BE  
13 AVAILABLE YET. THERE IS A DELAY FACTOR IN THE REPORTING OF  
14 THAT DATA BY THE FEDERAL TRADE COMMISSION. I KNOW THAT.  
15 Q. AND WHAT IS THE LAST OR THE MOST RECENT YEAR THAT  
16 YOU'VE LOOKED AT THAT DATA?  
17 A. THE DATA THAT I REPORTED HERE, AND THE CHART THAT  
18 YOU SAW HERE, WHICH IS THROUGH, I BELIEVE, 1995.  
19 Q. OKAY. AND HOW MUCH DID THE TOBACCO INDUSTRY AS A  
20 WHOLE -- I THINK THAT'S WHAT YOU MEANT, IN THE AGGREGATE, AS  
21 A WHOLE?  
22 A. CORRECT.  
23 Q. -- SPEND ON ADVERTISING IN 1995?  
24 A. IF YOU WOULD SHOW ME THAT EXHIBIT AGAIN, I THINK  
25 WE CAN PROBABLY GET AT LEAST AN INDICATION ON HOW MUCH IT  
26 IS.  
27 IT IS THE ONE WITH THE MULTIPLE COLORS ON IT,  
28 GREEN AND ORANGE.

4457  
1 Q. SO I THINK WHAT WE HAVE HERE IS THIS CHART?  
2 A. THAT'S CORRECT.  
3 Q. IT'S DEFENDANTS' EXHIBIT 6268?  
4 A. CORRECT.  
5 Q. AND CAN YOU SEE IT FROM THERE?  
6 A. YES, I CAN SEE IT.  
7 Q. HOW MUCH DID THE TOBACCO INDUSTRY SPEND ON  
8 CIGARETTE ADVERTISING IN 1995?  
9 A. I DON'T HAVE THE EXACT FIGURE ON THE CHART, BUT  
10 IT'S UNDER \$1 BILLION.  
11 Q. WHERE, ABOUT HERE (INDICATING)?  
12 A. THAT'S CORRECT.  
13 Q. OKAY. AND DO YOU KNOW HOW MUCH UNDER ONE  
14 BILLION?  
15 A. NO. BUT IT'S PROBABLY IN THE NEIGHBORHOOD -- AS  
16 I LOOK AT THE CHART, I'M JUST KIND OF GUESSING FROM THE  
17 CHART. IT'S PROBABLY SOMEWHERE IN THE NEIGHBORHOOD OF 800  
18 MILLION TO 900 MILLION.  
19 Q. 800 TO 900 MILLION.  
20 IF I UNDERSTAND THE WAY YOU HAVE SEPARATED THESE  
21 THINGS, ADVERTISING IS ONLY THOSE THINGS LIKE BILLBOARDS,  
22 MAGAZINES, NEWSPAPERS?  
23 A. AND POINT OF SALE.  
24 Q. AND POINT OF SALE?  
25 A. YES.  
26 Q. OKAY. AND THEN YOU HAVE A SERIES OF OTHER  
27 INFORMATION WITH RESPECT TO EXPENDITURES OF MONEY BY THE  
28 TOBACCO INDUSTRY THAT YOU CATEGORIZE DIFFERENTLY; CORRECT?

4458

1 A. NO, I DON'T CATEGORIZE IT DIFFERENTLY.  
2 THE FEDERAL TRADE COMMISSION CATEGORIZES. AND IT  
3 HAS THE REQUIREMENT FOR REPORTING OF THAT DATA IN THE FORM  
4 THAT YOU SEE IT THERE.

5 Q. YOU DON'T DISAGREE WITH THAT CATEGORIZATION, DO  
6 YOU?

7 THIS IS YOUR CHART, IS IT NOT?

8 A. WELL, IT'S MY CHART, BUT IT'S THE INFORMATION  
9 FROM THE FEDERAL TRADE COMMISSION, AND IT IS THE WAY THEY  
10 REQUIRE THAT THE INFORMATION BE REPORTED.

11 Q. I DON'T THINK WE'RE HAVING A PARTICULAR QUARREL  
12 HERE. I'M JUST TRYING TO UNDERSTAND IF YOU AGREE WITH THIS  
13 SEPARATION OF THE USE OF THE WORD "ADVERTISING" AND THESE  
14 OTHER ACTIVITIES THAT ARE NOT IN THIS CHART CALLED  
15 "ADVERTISING"?

16 A. YES, I DO.

17 Q. OKAY. SO IF I UNDERSTAND CORRECTLY, THERE'S  
18 ABOUT \$800 MILLION THAT WAS SPENT IN THE LAST YEAR REPORTED,  
19 1995, ON ADVERTISING.

20 AND HOW MUCH, SIR, ON THE "OTHER" CATEGORY?

21 AND WE'LL TALK ABOUT ALL THE THINGS THAT ARE IN  
22 THE "OTHER" CATEGORY.

23 A. WELL, THE NUMBER THERE WOULD SUGGEST THAT IT'S  
24 PROBABLY SOMEWHERE IN THE NEIGHBORHOOD OF, OH, 3/6 -- WHEN  
25 YOU COME DOWN, IT'S ABOUT A \$3.9 BILLION FIGURE.

26 Q. ISN'T IT BECAUSE YOU'RE SUBTRACTING THIS PART  
27 (INDICATING)?

28 A. THAT'S CORRECT. THAT'S CORRECT.

4459

1 Q. SO IF YOU ONLY LOOKED AT THE GREEN -- THIS IS  
2 STACKED ON TOP -- IT LOOKS LIKE IT GOES ALL THE WAY DOWN TO  
3 THE BOTTOM HERE?

4 A. IT DOES GO TO THE BOTTOM. THAT'S TOTAL SPENDING.  
5 IF YOU'LL NOTE -- I KNOW THIS IS CONFUSING.  
6 MAYBE IT'S MY CHARTMANSHIP THAT SHOULD BE ATTACKED HERE.

7 Q. IT'S A VERY LOVELY CHART. I HAVE NO QUARREL WITH  
8 THE CHART.

9 A. WHEN YOU GET CARRIED AWAY WITH POWER POINT, THIS  
10 IS WHAT HAPPENS.

11 WHAT YOU'VE GOT THERE IN THE GREEN IS, AGAIN, ALL  
12 OF THOSE ITEMS, THE FIRST FOUR ITEMS, PLUS THE AMOUNT THAT  
13 IS SPENT ON ADVERTISING.

14 AND THEN -- SO THE ORANGE IS JUST A PART OF THE  
15 GREEN, WHICH IS TOTAL SPENDING.

16 Q. OKAY. SO IF I UNDERSTAND CORRECTLY, IN 1995,  
17 ABOUT \$5 BILLION WAS SPENT TOTAL IN THAT ONE YEAR BY THE  
18 TOBACCO INDUSTRY FOR ALL FORMS OF SPENDING INTENDED TO  
19 COMMUNICATE TO THE PUBLIC SOMETHING ABOUT THE PRODUCT;  
20 CORRECT?

21 A. WELL, I DON'T WANT TO QUARREL WITH YOU ON THAT,  
22 BUT THAT IS NOT A FAIR CHARACTERIZATION.

23 IT IS THE TOTAL AMOUNT OF MONEY THAT WAS SPENT BY  
24 THE TOBACCO INDUSTRY ON THOSE ELEMENTS PULLED TOGETHER THAT  
25 THE FEDERAL TRADE COMMISSION HAS DEFINED AS PROMOTIONAL  
26 SPENDING.

27 AND THAT'S CONSISTENT WITH MY DISCUSSION WITH MR.  
28 ESCHER BEFORE THAT TWO OF THOSE ITEMS ARE ESSENTIALLY

4460

1 PRICING AND NOT PROMOTIONAL OR COMMUNICATION FACTORS.

2 Q. THAT'S RIGHT.

3 AND I THINK THAT THE THINGS THAT YOU SAID WERE  
4 PRICING AND NOT PROMOTIONAL AND NOT ADVERTISING -- NOT

5 ADVERTISING OR PROMOTION ARE THINGS THAT ARE -- YOU CALL  
6 PRICE FACTORS; CORRECT?  
7 A. THAT IS CORRECT.  
8 Q. OKAY. AND THEN THAT IS THE COUPON AND RETAIL  
9 VALUE?  
10 A. "COUPON & RETAIL VALUE ADDED" AND "PROMOTIONAL  
11 ALLOWANCES."  
12 Q. AND "PROMOTIONAL ALLOWANCES."  
13 SO THOSE TWO THINGS YOU WOULD TAKE OUT OF THE  
14 CATEGORY OF ADVERTISING AND PROMOTION; CORRECT?  
15 A. I WOULD, YES.  
16 Q. OKAY.  
17 THE COURT: WHEN YOU FINISH THIS CHART, LET US  
18 KNOW.  
19 MS. CHABER: Q. AND THAT'S BEEN YOUR TESTIMONY  
20 AND WAS YOUR TESTIMONY ON DIRECT EXAMINATION WITH RESPECT TO  
21 QUESTIONS THAT MR. ESCHER ASKED YOU?  
22 A. THAT IS CORRECT.  
23 MS. CHABER: OKAY. I THINK THIS IS A GOOD TIME,  
24 YOUR HONOR.  
25 THE COURT: OKAY. JURORS, LET'S TAKE A  
26 20-MINUTE RECESS.  
27 PLEASE CONTINUE TO FOLLOW THE ADMONITION. WE'LL  
28 SEE YOU BACK AT 10 TO 4:00.

4461

1 (RECESS TAKEN FROM 3:28 TO 3:50 P.M.)  
2 THE COURT: WE ARE BACK ON THE RECORD.  
3 MS. CHABER, WE DON'T HAVE A WITNESS.  
4 MS. CHABER: I'M GOOD, BUT I'M NOT THAT GOOD.  
5 I STARTED WITHOUT YOU. YOU ANSWERED ALL THE  
6 QUESTIONS. IT'S OKAY.  
7 THE WITNESS: THANK YOU.  
8 MS. CHABER: Q. WE WERE TALKING ABOUT THE  
9 MONEY SPENT BY THE TOBACCO INDUSTRY IN TOTAL ON ADVERTISING,  
10 AND THEN ON OTHER SPENDING THAT FALLS, SOME INTO PROMOTION  
11 AND SOME INTO A CATEGORY YOU WOULD CALL PRICE?  
12 A. CORRECT.  
13 Q. AND PROMOTIONAL ALLOWANCES WERE PRICE?  
14 A. THAT'S CORRECT.  
15 Q. AND LET'S UNDERSTAND AGAIN WHAT PROMOTIONAL  
16 ALLOWANCES ARE FOR.  
17 A. WELL, THERE ARE TWO WITHIN THE MARKETING  
18 DISCIPLINE. AND I HAVE NO KNOWLEDGE OF WHAT VARIOUS  
19 COMPANIES SPENT AND HOW THEY ALLOCATED OVER DIFFERENT TYPES  
20 OF PROMOTIONAL ALLOWANCES. BUT WITHIN THE MARKETING  
21 DISCIPLINE, PROMOTIONAL ALLOWANCES ARE THINGS THAT -- ARE  
22 ALLOWANCES THAT ARE GIVEN TO COMPANIES FOR DOING CERTAIN  
23 THINGS TO RETAILERS FOR PERFORMING CERTAIN DUTIES, LIKE, FOR  
24 INSTANCE, FOR FEATURING YOUR PRODUCT, FOR DOING SPECIAL  
25 DISPLAYS.  
26 THEY ALSO INCLUDE SLOTTING FEES, WHICH BECOME  
27 MUCH, MUCH MORE COMMON WITHIN THE GROCERY/CONVENIENCE STORE  
28 BUSINESS.

4462

1 Q. I'M LISTENING. I'M GOING TO GET A CHART WHILE  
2 YOU'RE TALKING.  
3 A. I'M DONE.  
4 Q. YOU ARE? OH.  
5 SLOTTING FEES?  
6 A. YES.  
7 Q. IS THAT WHAT YOU WERE SAYING?  
8 A. YES.  
9 Q. AND TELL US WHAT SLOTTING FEES ARE.

10 (WRITING ON BOARD)  
11 A. OKAY.  
12 Q. ACTUALLY, LET ME STRIKE THAT QUESTION AND JUST  
13 ESTABLISH SOME THINGS.  
14 IT'S FAIR THAT I'M PUTTING "PRICE" UP HERE  
15 BECAUSE THESE ALL FALL UNDER YOUR CATEGORY OF PRICE?  
16 A. CORRECT.  
17 Q. AND NOT PROMOTION AND NOT ADVERTISING?  
18 A. CORRECT.  
19 Q. OKAY. I JUST WANT TO MAKE SURE WE'RE ON THE SAME  
20 PAGE ON THAT. OKAY.  
21 SO THE FIRST THING WE HAD, WE HAD "PROMOTIONAL  
22 ALLOWANCES."  
23 I DON'T KNOW IF I CAN STAND THIS COLOR THIS CLOSE  
24 (INDICATING). A LITTLE DAY-GLO THERE.  
25 AND TELL ME AGAIN THE THINGS THAT FALL UNDER  
26 PROMOTIONAL ALLOWANCES.  
27 A. THESE WOULD BE ALLOWANCES THAT ARE GRANTED TO,  
28 FOR INSTANCE, A RETAILER FOR DOING CERTAIN THINGS AT THE  
4463  
1 RETAIL POINT OF SALE; FOR INSTANCE, CREATING SPECIAL  
2 DISPLAYS.  
3 IT MAY BE THAT THEY INCLUDED THE INFORMATION  
4 ABOUT THE BRAND IN THE COMMUNICATIONS THAT THEY MAKE TO THE  
5 VARIOUS PEOPLE.  
6 Q. LIKE A MAILER? LIKE WHEN A STORE SENDS OUT A  
7 MAILER, THEY MIGHT PUT SOMETHING IN THERE?  
8 A. CORRECT. AND THEY'RE BEING PAID TO DO THAT,  
9 WHICH MEANS, UNDER THE DEFINITION IN PRICING, THAT IS A  
10 REDUCTION FROM THE PRICE THEY PAY FOR THE GOODS. THEY GET  
11 THIS ALLOWANCE.  
12 Q. OKAY. SO IT'S DISPLAYS, COMMUNICATION. WE'LL  
13 UNDERSTAND A LITTLE MORE IN DETAIL, BUT I WANT TO GET ALL  
14 THE DIFFERENT CATEGORIES.  
15 PLACEMENT IN THE STORE?  
16 A. WELL, PLACEMENT IN THE STORE COULD BE ONE OF TWO  
17 THINGS. IT COULD BE THAT THEY GET A CERTAIN PLACEMENT, AS  
18 FOR INSTANCE IN A SUPERMARKET, AN END-OF-THE-AISLE DISPLAY.  
19 THAT'S WHERE SLOTTING FEES SOMETIMES COME INTO  
20 CONSIDERATION, AND SOMETIMES DO NOT.  
21 Q. IT COULD BE UNDER BOTH CATEGORIES?  
22 A. IT'S COULD BE WHAT TRADITIONALLY HAS BEEN KNOWN  
23 AS AN ALLOWANCE, BUT ALSO, IT CAN ALSO BE PART OF A SLOTTING  
24 FEE.  
25 Q. WE'LL PUT IT DOWN IN BOTH PLACES.  
26 WHAT WOULD YOU CALL THAT POSITIONING; PLACEMENT?  
27 A. I GUESS PLACEMENT.  
28 Q. TOO MANY P'S. I KNOW YOU DON'T LIKE THEM.  
4464  
1 COULD YOU GIVE ME A C WORD?  
2 A. NO, NOT FOR THAT. I'M SORRY.  
3 Q. SO A COMPANY MIGHT PAY MORE MONEY TO HAVE ITS  
4 PRODUCT IN A LOCATION IN A STORE WHERE IT'S GOING TO BE  
5 SEEN?  
6 A. AND AS I UNDERSTAND, NOT TO PRACTICE YOUR  
7 DISCIPLINE IN THE LAW, BUT WHAT WE TEACH IN MARKETING, WHEN  
8 YOU OFFER THAT KIND OF PRICING ARRANGEMENT, YOU HAVE TO  
9 OFFER IT ON AN EQUAL BASIS TO ALL OF THE RETAILERS WHO  
10 COMPETE WITH EACH OTHER.  
11 MY RECOLLECTION OF THAT, IT COMES OUT OF THE  
12 ROBINSON-PATMAN ACT.  
13 I'M NOT TRYING TO PRACTICE LAW WITH YOU. THIS IS  
14 WHAT WE TEACH IN THE MARKETING DISCIPLINE THAT THIS IS AN

15 AREA TO PAY PARTICULAR ATTENTION TO. SO THAT IF YOU OFFER  
16 THIS ALLOWANCE, YOU HAVE TO OFFER IT ON AN EQUAL BASIS TO  
17 ALL RETAILERS.

18 THE SAME THING IS TRUE WITH SLOTTING FEES.

19 Q. NOW, ARE YOU FAMILIAR, HOWEVER, WITH AGREEMENTS  
20 BETWEEN RETAILERS AND ANY OF THE TOBACCO COMPANIES FOR  
21 PAYMENT IF MORE THAN A CERTAIN PERCENTAGE OF THE PRODUCT --  
22 BRANDS OF THAT COMPANY WERE CARRIED AS OPPOSED TO OTHER  
23 BRANDS?

24 A. I'M NOT FAMILIAR SPECIFICALLY WITH THAT.

25 BUT TO BE RESPONSIVE TO YOU, I AM FAMILIAR --  
26 WHAT WE HAVE TO TEACH TO MANAGERS, THAT IF YOU DO THAT, AS  
27 FAR AS WE UNDERSTAND IT, IT HAS TO BE COST-JUSTIFIED.

28 Q. MEANING?

4465

1 A. MEANING THAT YOU HAVE TO JUSTIFY OFFERING IT TO  
2 ONE PERSON AND NOT ANOTHER OR SOMETHING LIKE THAT. YOU HAVE  
3 TO LITERALLY JUSTIFY THE DIFFERENCE, BECAUSE IT IS A  
4 DIFFERENCE IN PRICE, IN EFFECT, THAT YOU'RE OFFERING TO  
5 THEM.

6 AGAIN, I DON'T UNDERSTAND THE LAW. I'M JUST  
7 TELLING YOU WHAT I TEACH.

8 Q. YOU'RE TELLING ME WHAT YOU TEACH YOUR STUDENTS.  
9 YOU'RE NOT NECESSARILY SAYING THAT OUT IN THE  
10 REAL WORLD, THAT ALL THESE THINGS ALWAYS HAPPEN?

11 A. I DON'T THINK THAT. IN THE REAL WORLD, WHAT I  
12 TEACH FOR MY STUDENTS, AND MANY OF THEM ARE EXECUTIVES, IS  
13 REAL-WORLD STUFF. THIS IS NOT THEORY.

14 Q. WELL, LET ME ASK YOU THIS: ARE YOU FAMILIAR WITH  
15 ANY CIGARETTE COMPANY HAVING A PROGRAM WHERE THEY GO TO THE  
16 RETAILERS AND THEY SAY TO THE RETAILERS: "IF 85 PERCENT OF  
17 YOUR CIGARETTE STOCK IS OUR PRODUCTS, OUR BRANDS, WE'LL PAY  
18 YOU A CERTAIN AMOUNT OF MONEY"? ARE YOU FAMILIAR WITH  
19 THAT?

20 MR. ESCHER: OBJECTION, YOUR HONOR. BEYOND THE  
21 SCOPE OF DIRECT, AND RELEVANCE AS WELL, YOUR HONOR.

22 THE COURT: I HAVE TO BE CANDID WITH YOU. I  
23 DON'T SEE THE RELEVANCE.

24 MS. CHABER: IT GOES RIGHT TO THESE ISSUES.

25 THE COURT: LET ME GIVE YOU A LITTLE LATITUDE  
26 AND SEE WHERE YOU GO WITH THIS.

27 I'M NOT SURE I SEE IT, BUT UNLESS YOU WANT A  
28 SIDEBAR, I'M GOING TO GIVE YOU LATITUDE AND SEE WHERE IT

4466

1 GOES.

2 WHY DON'T YOU GO AHEAD.

3 MS. CHABER: Q. ARE YOU FAMILIAR WITH ANY  
4 PROGRAMS SUCH AS THAT THAT HAVE BEEN SET UP BY ANY OF THE  
5 TOBACCO COMPANIES WITH RETAILERS?

6 A. NO.

7 Q. AND THAT WOULD BE SOMETHING THAT YOU WOULD SAY  
8 WAS INAPPROPRIATE; CORRECT?

9 MR. ESCHER: OBJECTION. LACK OF FOUNDATION.  
10 IRRELEVANT.

11 THE COURT: IRRELEVANT. SUSTAINED.

12 MS. CHABER: Q. ARE YOU FAMILIAR WITH STORES  
13 THAT HAVE A PARTICULAR COMPANY'S BRANDS IN A MORE NOTICEABLE  
14 LOCATION?

15 A. YES.

16 Q. AND THAT'S A COMMON PRACTICE?

17 A. I DON'T KNOW WHETHER IT'S A COMMON PRACTICE, BUT  
18 IT IS ONE THAT HAS BEEN PRACTICED WITH BRANDS OF VARIOUS  
19 DIFFERENT PRODUCTS.

20 Q. AND WITH RESPECT TO CONVENIENCE STORES, FOR  
21 EXAMPLE, COMPANIES MIGHT PAY TO HAVE THEIR BRANDS BE THE  
22 MOST NOTICEABLE BRANDS TO PEOPLE WALKING INTO THE STORE;  
23 CORRECT?

24 A. IN SOME INSTANCES, THAT IS TRUE.  
25 AND IN FACT, THAT WOULD COME UNDER, IN MANY  
26 INSTANCES, THE CONCEPT OF A SLOTTING FEE.

27 Q. OKAY. SO THAT COMES UNDER THE SLOTTING FEE.  
28 IS THAT A PROMOTIONAL ALLOWANCE?

4467

1 A. THAT'S WHERE IT'S REPORTED, AS I UNDERSTAND IT,  
2 TO THE FEDERAL TRADE COMMISSION.

3 Q. SO AGAIN, IT DOESN'T FALL UNDER ADVERTISING AND  
4 IT DOESN'T FALL UNDER PROMOTION?

5 A. NO, IT DOES NOT.

6 Q. AND SLOTTING FEES. DO YOU KNOW HOW MUCH MONEY  
7 EITHER R.J. REYNOLDS OR PHILIP MORRIS OR ANY OTHER TOBACCO  
8 COMPANY PAYS TO RETAILERS IN SLOTTING FEES FOR HAVING, FOR  
9 EXAMPLE, THE MARLBORO BRAND ON ALL THE SHELVES THAT ARE AT  
10 EYE LEVEL?

11 A. I DO NOT KNOW HOW MUCH AN INDIVIDUAL BRAND PAYS.  
12 I JUST KNOW THAT IT IS A COMMON PRACTICE IN THE  
13 PACKAGE GOODS BUSINESS WITHIN RETAILERS.

14 Q. AND IT'S A COMMON PRACTICE AMONGST THE TOBACCO  
15 INDUSTRY, IS IT NOT?

16 A. AMONG OTHERS, YES.

17 Q. AND ANOTHER THING THAT FALLS UNDER PRICE ARE  
18 COUPONS?

19 A. YES.

20 Q. EXPLAIN TO ME WHAT YOU MEAN BY "COUPONS."

21 A. WELL, THESE ARE THE THINGS THAT PEOPLE EITHER  
22 RECEIVE IN THE MAIL, RECEIVE IN FLYERS, CLIP OUT OF  
23 MAGAZINES, CLIP OUT OF NEWSPAPERS.  
24 GENERALLY, THEY FALL INTO THE CATEGORIES OF, YOU  
25 KNOW, WHAT IN SOME CASES ARE CALLED TWOFORS. THAT MEANS YOU  
26 BUY ONE, YOU GET ONE FREE, SO YOU GET TWO FOR ONE OR  
27 SOMETIMES IT'S JUST CENTS OFF, 50 CENTS OFF AND SO FORTH, IN  
28 COUPONS.

4468

1 Q. AND GENERALLY, WHEN IT COMES TO GOODS LIKE  
2 CIGARETTES, IT'S THE MANUFACTURER THAT'S SORT OF BEARING THE  
3 COST OF THAT, NOT THE RETAILER?

4 A. WELL, THAT WAS TRUE HISTORICALLY, BUT IN RECENT  
5 YEARS IT'S NOT NECESSARILY TRUE IN ALL THE PACKAGE GOODS,  
6 BECAUSE MANY RETAILERS, IN AN ATTEMPT TO CHANGE THE PRICE  
7 FOR THEIR CUSTOMERS, HAVE DONE THIS: "YOU BRING IN A 50  
8 CENT COUPON AND WE'LL GIVE YOU AN EXTRA 50 CENTS OFF" OR  
9 SOMETHING LIKE THAT.

10 IN OTHER WORDS, THEY DOUBLE. IN SOME CASES IN  
11 RETAIL BUSINESS, THEY TRIPLE. SO THERE, A PART OF THAT IS  
12 BEING BORNE BY THE RETAILER.

13 Q. AND THAT I BELIEVE YOU GENERALIZE TO THE PACKAGE  
14 GOODS INDUSTRY. I WANT TO KEEP IT SPECIFIC TO THE CIGARETTE  
15 INDUSTRY.

16 A. I'M NOT SURE IF THE CIGARETTE -- THE RETAILERS DO  
17 THAT WITHIN THE CIGARETTE INDUSTRY, ALTHOUGH -- AND THE  
18 REASON WHY I SUSPECT THEY DO, HOWEVER, IS BECAUSE YOU SEE  
19 ADVERTISEMENTS IN NEWSPAPERS THAT SAY, YOU KNOW, "DOUBLE THE  
20 VALUE ON ALL COUPONS."

21 AND I WOULD ANTICIPATE THAT WOULD INCLUDE ALL  
22 COUPONS, WHICH INCLUDE OTHER PACKAGE GOODS, AND CIGARETTES  
23 PERHAPS.

24 Q. AND DO YOU KNOW WHETHER -- OR HAVE YOU EVER ASKED

25 R.J. REYNOLDS OR PHILIP MORRIS WHETHER OR NOT THEY REIMBURSE  
26 THE RETAILER SO THAT THE RETAILERS MAKE THE SAME AMOUNT OF  
27 MONEY ON THAT SALE AND DON'T LOSE MONEY ON IT?  
28 A. NO, I'VE NOT ASKED R.J. REYNOLDS OR PHILIP MORRIS  
4469  
1 THAT QUESTION.  
2 Q. AND ARE YOU AWARE OF A LAWSUIT BETWEEN R.J.  
3 REYNOLDS AND PHILIP MORRIS OVER RETAIL PLACEMENT?  
4 MR. ESCHER: YOUR HONOR, OBJECTION. IRRELEVANT,  
5 352.  
6 THE COURT: SUSTAINED. SUSTAINED ON BOTH  
7 GROUNDS.  
8 MS. CHABER: Q. NOW, DOES THE SPONSORING OF  
9 SPORTING EVENTS COME INTO -- WHERE DOES THAT FIT?  
10 A. PUBLIC ENTERTAINMENT.  
11 Q. OKAY. AND SO THAT'S ANOTHER PART OF THE TOTAL  
12 SPENDING?  
13 A. YES, IT IS.  
14 Q. AND THE TOTAL SPENDING IN THE LAST YEAR WE HAVE,  
15 19 -- DOES THAT ACTUALLY GO UP TO '95 OR IS THAT '94?  
16 A. THAT GOES UP TO '95.  
17 Q. '95?  
18 A. YES.  
19 Q. OKAY.  
20 A. THROUGH TO '95.  
21 Q. SO WE'VE GOT, I THINK WHAT YOU SAID, ABOUT -- YOU  
22 TAKE THIS LINE ACROSS (INDICATING). YOU SAID THAT WAS ABOUT  
23 800 MILLION.  
24 AND THIS IS JUST UNDER FIVE BILLION (INDICATING)?  
25 A. THE TOTAL SPENDING IS UNDER FIVE BILLION. SO THE  
26 SPENDING FOR THOSE THINGS OTHER THAN ADVERTISING IS 3.9  
27 BILLION, SOMETHING IN THERE, IN THAT GENERAL AREA.  
28 Q. ROUGHLY \$4 BILLION?  
4470  
1 A. YES.  
2 Q. OKAY. I MEAN, YOU KNOW, IF WE ARE NOT GOING TO  
3 BE EXACT ON OUR CHART, WE CAN'T BE EXACT ON OUR MATH, I  
4 GUESS?  
5 A. RIGHT.  
6 Q. SO OF ABOUT THE \$4 BILLION OF CIGARETTE SPENDING,  
7 SOME OF THAT GOES TO SPORTING EVENTS?  
8 A. YES.  
9 Q. AND AMONG THE SPORTING EVENTS WOULD BE THINGS  
10 LIKE TENNIS?  
11 A. I BELIEVE THE OTHER -- I DON'T KNOW WHETHER  
12 SPONSORSHIP STILL CONTINUES FOR TENNIS.  
13 THERE WAS SPONSORSHIP OF TENNIS BY VIRGINIA  
14 SLIMS, VIRGINIA SLIMS TENNIS. I DON'T KNOW WHETHER IT  
15 CONTINUES. I KNOW IT WAS, YES.  
16 Q. CERTAINLY FOR A GOOD 15 YEARS OR SO?  
17 A. OH, I DON'T KNOW THE TIME PERIOD. I'M SORRY. I  
18 JUST DON'T KNOW.  
19 I KNOW IT WAS OVER A PERIOD OF TIME. BUT I DON'T  
20 KNOW HOW MANY YEARS, NO.  
21 Q. AND YOU KNOW THAT EVERY TIME THERE'S SOMETHING IN  
22 THE NEWSPAPER, SOMETHING IN THE SCHEDULE, SOMETHING  
23 ANNOUNCED ON THE TELEVISION, THE WORDS "VIRGINIA SLIMS" ARE  
24 ANNOUNCED EVERY TIME IN CONJUNCTION WITH THAT?  
25 A. IN SOME CASES, THEY ARE. ALTHOUGH I UNDERSTAND  
26 SOME OF THE BROADCAST MEDIA HAVE -- AND SOME OF THE  
27 REPORTING MEDIA HAVE STOPPED USING THE NAME "VIRGINIA SLIMS"  
28 BECAUSE OF EDITORIAL POLICY WITHIN THE ORGANIZATION.  
4471

1 Q. THAT'S VERY RECENT, ISN'T IT?  
2 A. I THINK IT IS.  
3 Q. AND SO SOME OF THE THINGS THAT ARE SPONSORED, FOR  
4 EXAMPLE, BY R.J. REYNOLDS ARE RACING?  
5 A. YES, RACING.  
6 Q. RACING IS -- WE ARE TALKING ABOUT AUTOMOBILE  
7 RACING; RIGHT?  
8 A. YOU ARE GETTING ME INTO DANGEROUS GROUND HERE,  
9 BECAUSE I'M NOT AN AFICIONADO OF RACING.  
10 IT IS AUTOMOBILE RACING, AS FAR AS I KNOW. I  
11 NEVER WATCH THAT STUFF ON TELEVISION.  
12 Q. BUT YOU DO UNDERSTAND THAT IS AUTOMOBILE RACING,  
13 SOMETHING THAT ONE MIGHT CONSIDER TO BE A RISKY SPORT?  
14 A. WELL, I GUESS I ENVISION THAT AUTOMOBILE RACING  
15 IS RISKY INHERENTLY, YES.  
16 Q. I THINK YOU SAID ON DIRECT EXAMINATION THAT YOU  
17 THOUGHT LESLIE WHITELEY WAS A RISK-TAKER BECAUSE SHE RODE  
18 MOTORCYCLES.  
19 DO YOU REMEMBER SAYING THAT?  
20 A. SHE WAS INTERESTED IN MOTORCYCLES, YES.  
21 Q. SHE WAS INTERESTED IN MOTORCYCLES?  
22 A. YES.  
23 Q. IN YOUR MIND, IS EVERYBODY WHO IS INTERESTED IN  
24 MOTORCYCLES A RISK-TAKER?  
25 A. NO. BUT IT IS GENERALLY CLASSIFIED, AS FAR AS I  
26 KNOW, AS RISK-TAKING BEHAVIOR TO RIDE A MOTORCYCLE.  
27 Q. DO YOU KNOW THAT R.J. REYNOLDS SPONSORS  
28 MOTORCYCLE RACING?  
4472  
1 A. NO, I DIDN'T KNOW THAT. I'VE NEVER WATCHED, SO I  
2 DIDN'T KNOW THAT.  
3 Q. DO YOU KNOW, SIR, THAT R.J. REYNOLDS HAD A HARLEY  
4 DAVIDSON WITH THE CAMEL NAME ON IT THAT THEY GAVE AWAY AS A  
5 PRIZE?  
6 A. NO.  
7 Q. WHEN THE RACING TAKES PLACE, THE NAME "MARLBORO,"  
8 IF IT'S A MARLBORO RACE -- DO THEY SPONSOR ANY TEAMS?  
9 A. I DON'T KNOW.  
10 Q. YOU'VE NEVER DONE ANY WORK FOR PHILIP MORRIS?  
11 A. WELL, NO. I'VE NEVER BEEN EMPLOYED BY PHILIP  
12 MORRIS.  
13 I WAS RETAINED, AS I'M SURE YOU KNOW, IN THE  
14 CIPOLLONE TRIAL BY A LAW FIRM WHOSE CLIENT WAS PHILIP  
15 MORRIS. THAT'S BACK IN THE 1980S.  
16 SO I'M NOT CONVERSANT WITH WHETHER OR NOT  
17 MARLBORO SPONSORS RACES OR THAT KIND OF THING.  
18 Q. AT THE TIME THAT YOU TESTIFIED FOR THE VERY FIRST  
19 TIME, BEFORE YOU'D EVER PUBLISHED ANYTHING AT ALL ABOUT  
20 CIGARETTES OR TOBACCO, YOU WERE DOING IT ON BEHALF OF MORE  
21 THAN JUST R.J. REYNOLDS? YOU WERE DOING IT ON BEHALF OF  
22 PHILIP MORRIS AS WELL; CORRECT?  
23 A. NO, THAT IS NOT A CORRECT STATEMENT.  
24 I WAS DOING IT -- TO CLARIFY THE RECORD, SO  
25 THAT YOU UNDERSTAND WHY I STATED THAT, THAT THE CIPOLLONE  
26 TRIAL -- AND MY RECOLLECTION IS THAT THE DEFENDANTS IN THE  
27 CIPOLLONE TRIAL WERE NOT R.J. REYNOLDS AND R.J. REYNOLDS HAD  
28 NOTHING TO DO WITH THE TRIAL, BUT RATHER, THE DEFENDANTS  
4473  
1 WERE PHILIP MORRIS, LORILLARD AND LIGGETT.  
2 Q. SO THAT TRIAL WASN'T FOR R.J. REYNOLDS. IT WAS  
3 FOR THREE OF THE OTHER CIGARETTE MANUFACTURERS; CORRECT?  
4 A. THEY WERE THE DEFENDANTS, YES.  
5 Q. YES. AND IN ENGLE, ALL OF THE CIGARETTE



6 MANUFACTURERS WERE DEFENDANTS AND HIRED YOU, DID THEY NOT?  
7 A. NO, THEY DID NOT.  
8 SPECIFICALLY, I WAS HIRED BY A LAW FIRM. AND  
9 THAT LAW FIRM, AS I UNDERSTAND IT, REPRESENTS R.J. REYNOLDS  
10 AND DOES NOT REPRESENT ALL THE OTHER PEOPLE. I WAS JUST  
11 HIRED BY A LAW FIRM.  
12 I WAS NOT HIRED BY THE TOBACCO COMPANIES. I WAS  
13 NOT HIRED BY MULTIPLES OF LAW FIRMS, JUST ONE.  
14 Q. YOU WERE HIRED BY A LAW FIRM REPRESENTING R.J.  
15 REYNOLDS IN THAT CASE?  
16 A. CORRECT.  
17 Q. AND REPRESENTING LORILLARD, LIGGETT AND BROWN &  
18 WILLIAMSON; WERE THOSE THE THREE?  
19 A. NO. IN WHAT CASE?  
20 Q. IN THE CIPOLLONE CASE.  
21 A. THE CIPOLLONE CASE, IT WAS PHILIP MORRIS,  
22 LORILLARD AND LIGGETT.  
23 Q. AND HAVE YOU EVER TESTIFIED OR BEEN DEPOSED OR  
24 BEEN HIRED BY A LAW FIRM REPRESENTING BROWN & WILLIAMSON?  
25 A. NO.  
26 Q. DO YOU KNOW ANY OTHER CIGARETTE COMPANIES BESIDES  
27 THE ONES THAT WE'VE JUST NAMED?  
28 A. NO.  
4474  
1 Q. SO WHEN WE'RE TALKING ABOUT \$6 BILLION IN 1994 OR  
2 \$5 BILLION IN 1995 OF SPENDING ON ADVERTISING, PROMOTION,  
3 PRICING, THAT'S ON BEHALF OF FIVE COMPANIES?  
4 A. WELL, IT'S ON BEHALF OF ALL OF THE MANUFACTURERS  
5 OF CIGARETTES IN THE UNITED STATES.  
6 Q. WHICH INCLUDES COMPANIES OTHER THAN THE TWO  
7 INVOLVED HERE? YES?  
8 A. I DON'T KNOW.  
9 Q. FIVE COMPANIES?  
10 A. I DON'T KNOW WHO THE COMPANIES ARE, HOW MANY  
11 COMPANIES THERE ARE.  
12 THERE ARE -- MY KNOWLEDGE, IT IS ALL OF THE  
13 COMPANIES. IF YOU SAY IT'S FIVE -- I MEAN, IF YOU WILL  
14 ASSURE ME IT'S FIVE, I WILL KIND OF AGREE WITH YOU, BECAUSE  
15 I DON'T KNOW.  
16 Q. LET ME ASK YOU. YOU'RE THE MARKETING EXPERT.  
17 HOW MANY COMPANIES MAKE UP THE CIGARETTE  
18 MANUFACTURERS' MARKET?  
19 A. I'VE NEVER STUDIED THAT, SO I DON'T KNOW HOW MANY  
20 MANUFACTURERS MAKE UP THE CIGARETTE MARKET.  
21 Q. NOW, I THINK YOU HAVE "PUBLIC ENTERTAINMENT."  
22 DOES THAT INCLUDE THINGS LIKE WHEN R.J. REYNOLDS OR ANOTHER  
23 CIGARETTE COMPANY SPONSORS MUSIC CONCERTS?  
24 A. I WOULD ANTICIPATE THAT IT DOES.  
25 Q. YOU'VE HEARD --  
26 A. PUBLIC ENTERTAINMENT, YES.  
27 Q. YOU HAVE HEARD OF THE KOOL JAZZFEST?  
28 A. NO, I REALLY HAVE NOT. I'M SORRY. I'M NOT TOO  
4475  
1 MUCH INTO JAZZ EITHER.  
2 Q. HOW ABOUT BLUES?  
3 A. NO, I'M MORE -- I'M MORE A CLASSIC MUSIC GUY.  
4 SORRY.  
5 Q. NOT MUCH SPONSORSHIP ON THE CLASSIC MUSIC SIDE,  
6 IS THERE, BY THE CIGARETTE COMPANIES?  
7 A. I'M NOT FAMILIAR WITH ANY.  
8 Q. IT TENDS TO BE MUSIC THAT IS LIKED BY -- THIS IS  
9 NOTHING PERSONAL INTENDED -- BY A LITTLE YOUNGER SET?  
10 A. NO, I WOULD -- I WOULD ENTHUSIASTICALLY DISAGREE

11 WITH YOU. I HAVE SOME PEOPLE WHO ARE CONTEMPORARIES OF  
12 MINE, IN FACT SOME PEOPLE WHO ARE OLDER, THAT DEARLY LOVE  
13 JAZZ.  
14 I ALSO KNOW A LARGE NUMBER OF PEOPLE, INCLUDING A  
15 MAJOR SHARE OF STUDENTS AT MY UNIVERSITY, WHO DEARLY LOVE  
16 CLASSICAL MUSIC. I DON'T THINK MUSIC IS GERMANE TO ANY  
17 PARTICULAR AGE.

18 Q. AND, SIR, WHEN THERE IS SPONSORSHIP IN CLUBS, I  
19 DON'T SUPPOSE, GIVEN THAT YOU'RE A CLASSICAL MUSIC FAN  
20 YOU'VE GONE TO ANY OF THE LATE NIGHT CLUBS SOUTH OF MARKET  
21 THAT CATER TO -- OH, I DON'T KNOW -- HARD ROCK, PUNK,  
22 WHATEVER IS CURRENT THESE DAYS?

23 A. SOUTH OF MARKET? I'M NOT EVEN A RESIDENT OF SAN  
24 FRANCISCO, SO I GUESS NOT.

25 Q. WELL, YOU HAD SAID SOMETHING EARLIER THAT LED ME  
26 BELIEVE YOU HAD A GOOD CLUE OF LOCALES.

27 A. YES, ACTUALLY I DO KNOW SAN FRANCISCO. OF  
28 COURSE, THAT WAS -- I GOT DISCHARGED FROM THE SERVICE HERE.

4476  
1 AND THAT WAS IN 19 -- LET ME SEE -- '57.

2 Q. I DON'T THINK --

3 A. SO I THINK MY RECOLLECTION IS PROBABLY NOT  
4 EXACTLY GERMANE TO WHAT SAN FRANCISCO IS LIKE TODAY.

5 Q. I DON'T THINK THE MUSIC CLUBS SOUTH OF MARKET  
6 WERE IN EXISTENCE THEN, THOUGH I GUESS THERE WERE SOME OTHER  
7 GOOD CLUBS AND OTHER PLACES.

8 BUT YOU WOULD INCLUDE THAT TYPE OF SPONSORSHIP.  
9 AND YOU'RE FAMILIAR WITH SPONSORSHIP BY CIGARETTE COMPANIES  
10 OF BARS AND CLUBS, ARE YOU NOT?

11 A. I UNDERSTAND THAT THEY DO SPONSOR THINGS THAT  
12 WOULD BE LISTED THERE AS PUBLIC ENTERTAINMENT.

13 Q. AND IN FACT, THERE IS A LARGE SPONSORSHIP BY  
14 CIGARETTE COMPANIES OF CLUBS THAT ARE PLACES THAT SELL  
15 ALCOHOL; CORRECT?

16 A. I DON'T KNOW THAT. I DON'T KNOW WHAT YOU MEAN BY  
17 "LARGE." I'M NOT TRYING TO QUIBBLE WITH YOU. I JUST DON'T  
18 UNDERSTAND WITH YOU MEAN BY "LARGE."

19 Q. LET ME ASK YOU, DO YOU KNOW THE BREAKDOWN OF ANY  
20 OF THESE NUMBERS IN THIS CONGLOMERATE, AGGREGATE NUMBER THAT  
21 YOU PUT UP HERE?

22 A. SURE DO.

23 Q. BUT YOU CAN'T TELL ME OFF THE TOP OF YOUR HEAD --

24 A. I SURE CAN.

25 Q. -- WHO GOES TO THE CLUBS?

26 A. NO, I CAN'T TELL YOU WHO GOES INTO CLUBS, BUT I  
27 CAN TELL HOW MUCH OF THAT DOLLAR THAT IS SPENT BY THE  
28 CIGARETTE COMPANIES IS ALLOCATED TO PUBLIC ENTERTAINMENT.

4477  
1 Q. I ASKED YOU ABOUT CLUBS, SIR.  
2 CAN YOU TELL ME ABOUT CLUBS?

3 A. NO, BUT I CAN TELL YOU ABOUT PUBLIC  
4 ENTERTAINMENT. THAT'S ALL I KNOW.

5 Q. AND THEN, "ADVERTISING SPENDING BELOW," THAT'S  
6 THE BILLBOARDS, THE MAGAZINES, THE NEWSPAPERS WE'VE TALKED  
7 ABOUT?

8 A. AND POINT OF SALE.

9 Q. AM I RIGHT THAT IN 1970, THERE WAS -- '70 AND  
10 '71, THERE WAS STILL TV ADVERTISING?

11 A. THE TELEVISION ADVERTISING FOR CIGARETTES, AS I  
12 RECALL, CEASED IN JANUARY OF 1971, SOMETIME IN -- ALMOST  
13 IMMEDIATELY AFTER THE SUPERBOWL.

14 Q. IN FACT, THE SUPERBOWL HAD CIGARETTE ADS ON IT  
15 AND THAT WAS THE LAST ADVERTISING ON TV; CORRECT?

16 A. MY RECOLLECTION IS THAT MAY BE TRUE.  
17 Q. AND, SIR, YOU MENTIONED THE FLINTSTONES.  
18 AND IT WAS ON AT 8:30 AT NIGHT?  
19 A. YES.  
20 Q. DO YOU KNOW HOW MANY TEENAGERS OR PRETEENAGERS  
21 WOULD BE WATCHING TV, ONE OF THE THREE STATIONS ON TV AT  
22 THAT TIME?  
23 MR. ESCHER: OBJECTION. VAGUE, YOUR HONOR.  
24 THE COURT: WHAT'S VAGUE?  
25 MR. ESCHER: "PRETEENAGERS." DOES SHE MEAN --  
26 THE COURT: SHE DIDN'T SAY "PRETEENAGERS." SHE  
27 SAID "TEENAGERS."  
28 MR. ESCHER: SHE SAID "TEENAGERS AND  
4478  
1 PRETEENAGERS."  
2 THE COURT: SHE SAID "PRETEENAGERS AND  
3 TEENAGERS."  
4 YOU MEAN THE COMBINATION TOGETHER?  
5 MS. CHABER: YES.  
6 THE COURT: OKAY. SHE MEANS -- I THINK SHE  
7 MEANS THE TOTAL NUMBER OF TEENAGERS AND PRETEENAGERS.  
8 MR. ESCHER: BY "PRETEENAGERS," WE MEAN EVERYONE  
9 DOWN TO INFANTS?  
10 THE COURT: I SEEM --  
11 MS. CHABER: I DON'T THINK YOU CAN GO MUCH LOWER  
12 THAN INFANTS.  
13 THE COURT: OKAY. SHE MEANS EVERYBODY FROM AGE  
14 ZERO THROUGH 19.  
15 MR. ESCHER: THAT'S FINE, YOUR HONOR, WITH THAT  
16 UNDERSTANDING.  
17 THE WITNESS: SO DO I KNOW THE NUMBER OF PEOPLE  
18 BETWEEN THE AGES OF ZERO AND 19 WHO WERE UP AND WATCHING  
19 TELEVISION AT THAT TIME?  
20 MS. CHABER: Q. WHO WATCHED TELEVISION AT 8:30  
21 AT NIGHT WHEN THE ADULT CARTOON THE FLINTSTONES WAS ON.  
22 A. I DON'T KNOW, BUT IT WASN'T MY KIDS.  
23 Q. I GUESS YOU HAD A STRICTER HOUSEHOLD THAN I DID.  
24 HAVE YOU LOOKED AT THE SURGEON GENERAL'S -- FIRST  
25 OF ALL, LET ME ASK YOU: YOU SAID YOU RELIED ON GOVERNMENT  
26 DATA FOR MANY OF THE OPINIONS THAT YOU EXPRESSED ON DIRECT  
27 EXAMINATION; IS THAT CORRECT?  
28 A. THAT'S CORRECT.  
4479  
1 Q. AND YOU KNOW THAT THE SURGEON GENERAL OF THE  
2 UNITED STATES ISSUES REPORTS OR THE OFFICE OF THE SURGEON  
3 GENERAL, THE OFFICE OF SMOKING AND HEALTH ISSUES REPORTS  
4 CALLED "SURGEON GENERAL'S REPORTS ON SMOKING"?  
5 A. YES, THEY DO, ON A PERIODIC BASIS.  
6 Q. YOU KNOW THAT IN 1994, THEY ISSUED A REPORT THAT  
7 WAS DEDICATED TO YOUTH SMOKING?  
8 A. I BELIEVE THAT THAT MAY BE THE TITLE. I'M NOT  
9 SURE. BUT AT LEAST IT CONCERNED YOUTH SMOKING, YES.  
10 Q. DO YOU RECALL THE TITLE BEING "PREVENTING TOBACCO  
11 USE AMONG YOUNG PEOPLE"?  
12 A. I DON'T RECALL THAT AS THE EXACT TITLE, BUT IF  
13 YOU SUGGEST IT IS AND ARE READING FROM THAT, THAT'S FINE. I  
14 KNOW IT CONCERNED -- IT CONCERNS YOUTH SMOKING.  
15 Q. AND YOU KNOW -- AND WE HEARD A LOT OF TESTIMONY  
16 FROM PEOPLE WHO ACTUALLY WORKED ON SURGEON GENERAL'S  
17 REPORTS -- THAT THERE ARE MULTIPLE LEVELS OF PEER REVIEW  
18 DONE FOR WHAT GETS PUBLISHED AS THE SURGEON GENERAL'S  
19 REPORT?  
20 A. NO, I DIDN'T HEAR THAT, BECAUSE I HAVE NOT BEEN

21 ABLE -- I HAVE NOT BEEN PRIVY TO THE TESTIMONY IN THIS  
22 TRIAL.

23 Q. I MISSPOKE IF THAT'S HOW YOU UNDERSTOOD MY  
24 QUESTION.

25 A. THAT'S HOW I DID.

26 Q. OKAY. YOU KNOW, SIR, THAT SURGEON GENERAL'S  
27 REPORTS ARE SUBJECT TO MULTIPLE LEVELS OF PEER REVIEW BEFORE  
28 THEY ARE RELEASED; CORRECT?

4480

1 A. NO, I'M NOT AWARE THAT THEY'RE SUBJECT TO  
2 MULTIPLE LEVELS OF PEER REVIEW BEFORE THEY'RE RELEASED.

3 Q. DO YOU KNOW HOW THE SURGEON GENERAL'S REPORTS  
4 THAT HAVE BEEN ISSUED ON SMOKING AND HEALTH, THE PROCEDURE  
5 OF HOW THEY ARE PUT TOGETHER?

6 A. THE PRECISE PROCEDURE, NO.

7 BUT IT IS MY UNDERSTANDING THAT CERTAIN SECTIONS  
8 OF THE SURGEON GENERAL'S REPORT ARE ASSIGNED TO INDIVIDUALS,  
9 INDIVIDUAL PEOPLE TO PUT TOGETHER; A COMPILATION OR A  
10 SUMMARY OF VARIOUS PIECES OF LITERATURE.

11 SO IT IS WHAT WE KNOW, WITHIN MY DISCIPLINE AND  
12 OTHER SOCIAL SCIENCE DISCIPLINES, AT LEAST, AS A LITERATURE  
13 REVIEW. AND THAT TO ADDRESS CERTAIN ISSUES, SOMEONE IS  
14 ASSIGNED TO TAKE THE VARIOUS PIECES OF LITERATURE AND REVEAL  
15 THEM WITHIN THAT SECTION, ADDING IN, IN MANY CASES,  
16 INTERPRETATIONS ON THEIR PART AS TO WHAT THAT LITERATURE  
17 SHOWS.

18 Q. AND, SIR, YOU DO NOT KNOW, FROM ANY OF THE WORK  
19 THAT YOU HAVE DONE, WHETHER OR NOT WHAT YOU CALL THE  
20 INTERPRETATIONS ON REVIEW MATERIAL ARE SUBJECT TO PEER  
21 REVIEW OF OTHER PEOPLE WHO ARE CONSIDERED EXPERTS IN THAT  
22 SAME FIELD?

23 A. NO. AND I'M USING THE WORD "PEER REVIEW" AS MY  
24 UNDERSTANDING OF THE ONE THAT IS COMMONLY USED IN PUTTING  
25 TOGETHER A REVIEW OF ARTICLES THAT ARE FEATURED IN JOURNALS.

26 Q. AND I'M USING "PEER REVIEW" IN THE SAME FASHION,  
27 AND ASKING YOU, SIR: ISN'T IT A FACT THAT YOU DO NOT KNOW  
28 WHETHER OR NOT THE SURGEON GENERAL'S REPORTS, THE

4481

1 CONCLUSIONS AND THE ARTICLES THAT ARE PLACED THEREIN, ARE  
2 SUBJECT TO PEER REVIEW BY EXPERTS IN THE FIELD?

3 A. I DO NOT KNOW THAT. AND I DO NOT KNOW WHETHER OR  
4 NOT THOSE PEER REVIEWS, EVEN IF THEY DO EXIST, ARE  
5 DOUBLE-BLIND PEER REVIEWS.

6 Q. AND DO YOU KNOW WHETHER OR NOT THERE ARE MULTIPLE  
7 LEVELS, SIR, OF PEER REVIEW, WHERE THE ARTICLES ARE WRITTEN,  
8 THEY'RE REVIEWED BY OTHERS, THEY ARE THEN CHANGED,  
9 CORRECTED, REVIEWED BY OTHERS, AND SO FORTH, ALL THE WAY UP  
10 THE CHAIN?

11 A. NO, I DO NOT.

12 Q. AND, SIR, IN ALL OF THE WORK THAT YOU HAVE DONE  
13 REVIEWING GOVERNMENT DATA -- I THINK A COUPLE OF THINGS GOT  
14 MARKED FOR IDENTIFICATION THAT YOU SAID THAT YOU RELIED  
15 ON -- SIR, DID YOU GO AND EXAMINE THE 1994 REPORT OF THE  
16 SURGEON GENERAL ON PREVENTING TOBACCO USE AMONG YOUNG  
17 PEOPLE?

18 A. YES, I DID.

19 Q. AND, SIR, WOULD YOU AGREE THAT ONE OF THE  
20 CONCLUSIONS REACHED IN THE SURGEON GENERAL'S REPORT WITH  
21 RESPECT TO PREVENTING TOBACCO USE AMONG YOUNG PEOPLE WAS  
22 THAT SMOKING WAS A FACILITATOR FOR OTHER DRUG USE?

23 A. I'D LIKE TO SEE WHAT YOU ARE QUOTING FROM TO  
24 REFRESH MY MEMORY, BECAUSE THAT IS NOT MY MEMORY OF WHAT IS  
25 CONTAINED IN THE SURGEON GENERAL'S REPORT.

26 Q. FIRST, I ASKED IF YOU RECALL IF THAT'S A  
27 CONCLUSION?  
28 A. I DO NOT RECALL IT AS A CONCLUSION.  
4482  
1 Q. OKAY. SIR, YOU AND MR. ESCHER PUT UP A CHART  
2 WITH RESPECT TO USE OF OTHER SUBSTANCES, LIKE ALCOHOL AND  
3 MARIJUANA?  
4 A. CORRECT.  
5 Q. AND, SIR, DID YOU LOOK INTO THE ISSUE OF WHICH  
6 COMMONLY COMES FIRST, THE USE OF CIGARETTES OR THE USE OF  
7 THOSE OTHER SUBSTANCES, ALCOHOL OR MARIJUANA?  
8 A. IN MY REVIEW OF THE UNDERLYING DOCUMENTS  
9 ASSOCIATED WITH THE SURGEON GENERAL'S REPORT, I DID SEE IN  
10 THOSE UNDERLYING DOCUMENTS INFORMATION THAT ALLOWED ME TO  
11 MAKE A CONCLUSION CONCERNING THAT SUBJECT.  
12 Q. SIR, LET ME ASK YOU FIRST IF YOU AGREE WITH THIS  
13 CONCLUSION. I'LL BE HAPPY TO GIVE YOU A COPY OF IT AFTER,  
14 BUT LET ME JUST ASK YOU IF YOU AGREE WITH THE CONCLUSION  
15 FIRST, AND THEN YOU CAN CHECK -- I WILL GIVE IT TO YOU NOW.  
16 YOU CAN CHECK AND SEE IF I READ THE CONCLUSION CORRECTLY.  
17 A. ARE YOU GOING TO READ FROM THE SURGEON GENERAL'S  
18 REPORT TO ME?  
19 Q. I INTEND TO. I HAVE ONE FOR YOU TOO, YOUR  
20 HONOR.  
21 PAGE 41, SIR.  
22 A. (TO THE COURT:) MAY I ASK A QUESTION? CAN I  
23 READ FROM THE SURGEON GENERAL'S REPORT IN RESPONSE?  
24 I THOUGHT THIS WAS HEARSAY YOU CAUTIONED ME  
25 ABOUT, YOUR HONOR.  
26 THE COURT: NO. NO. OKAY. THAT'S A FAIR  
27 QUESTION.  
28 MS. CHABER: THAT'S A FAIR QUESTION.  
4483  
1 THE COURT: THE ANSWER IS, IF MS. CHABER ASKS  
2 YOU ABOUT THE CONTENT OF THAT DOCUMENT, YOU CAN RESPOND BY  
3 REFERENCE TO THE CONTENT OF THAT DOCUMENT.  
4 SO THE ANSWER TO THE QUESTION IS YES, YOU MAY.  
5 THE WITNESS: THANK YOU VERY MUCH. I DIDN'T  
6 WANT TO GET IN TROUBLE WITH YOU.  
7 THE COURT: THE RULES OF LAW CHANGE IN A  
8 CIRCUMSTANCE WHERE SHE ASKS YOU ABOUT THE CONTENT OF A  
9 DOCUMENT.  
10 THE WITNESS: THANK YOU.  
11 THE COURT: YOU CAN REFER TO THE CONTENT OF A  
12 DOCUMENT IN REPLY.  
13 THE WITNESS: I JUST WANT TO MAKE SURE I WASN'T  
14 TRAMPLING ON THE WRONG TOES, YOUR HONOR.  
15 MS. CHABER: LET ME JUST GIVE YOU --  
16 THE COURT: DOES THIS HAVE A NUMBER ON IT?  
17 MS. CHABER: I DON'T THINK THIS HAS PREVIOUSLY  
18 BEEN MARKED.  
19 THE COURT: DO YOU WANT TO MARK IT?  
20 MS. CHABER: YES. I HAVE A COPY FOR EVIDENCE.  
21 PAGE 41, YOUR HONOR.  
22 THE COURT: BUT YOU ARE GOING TO MARK THE WHOLE  
23 THING?  
24 MS. CHABER: YES, I AM GOING TO MARK THE WHOLE  
25 DOCUMENT.  
26 THE CLERK: IS THE BINDER THE WHOLE DOCUMENT?  
27 MS. CHABER: YES.  
28 THE CLERK: PLAINTIFFS' EXHIBIT 1944 FOR  
4484  
1 IDENTIFICATION.

2 (DOCUMENT MORE PARTICULARLY  
3 LISTED IN THE INDEX MARKED  
4 FOR IDENTIFICATION PLAINTIFFS'  
5 EXHIBIT # 1944)  
6 MS. CHABER: Q. I'D ASK YOU TO LOOK AT THE  
7 CONCLUSIONS ON PAGE 41 ON THE CHAPTER ENTITLED  
8 "INTRODUCTION. HEALTH CONSEQUENCES OF SMOKING AMONG YOUNG  
9 PEOPLE," AND ASK YOU IF I'VE READ CONCLUSION 3 CORRECTLY.  
10 "TOBACCO USE IS ASSOCIATED WITH ALCOHOL AND  
11 ILLICIT DRUG USE AND IS GENERALLY THE FIRST DRUG  
12 USED BY PEOPLE WHO ENTER" --  
13 THE COURT: "BY YOUNG PEOPLE."  
14 MS. CHABER: THANK YOU, YOUR HONOR.  
15 Q. -- "USED BY YOUNG PEOPLE WHO ENTER A SEQUENCE OF  
16 DRUG USE THAT CAN INCLUDE TOBACCO, ALCOHOL,  
17 MARIJUANA AND HARDER DRUGS."  
18 DID I READ THAT CORRECTLY, SIR?  
19 A. YES, YOU DID.  
20 Q. AND, SIR, LOOKING AT CONCLUSION NO. 2 OF THE 1994  
21 SURGEON GENERAL'S REPORT ON THE SAME PAGE, TELL ME IF I'VE  
22 READ THIS CORRECTLY:  
23 "AMONG ADDICTIVE BEHAVIORS, CIGARETTE SMOKING IS  
24 THE ONE LIKELY TO BECOME" --  
25 THE COURT: "MOST LIKELY."  
26 MS. CHABER: GOSH, YOUR HONOR. I'M DOING BAD.  
27 THANK YOU.  
28 Q. LET ME START OVER.  
4485  
1 I WILL TELL YOU WHAT. I'LL GET SOME WATER.  
2 MR. ESCHER: BEFORE WE GET GOING ON PARAGRAPH 2,  
3 I'M GOING TO OBJECT. I THINK IT'S BEYOND THE SCOPE OF THE  
4 DIRECT EXAMINATION.  
5 THE COURT: I DON'T THINK SO.  
6 MS. CHABER: Q. LET ME TRY AGAIN AND TRY TO  
7 READ IT CORRECTLY THIS TIME.  
8 "AMONG ADDICTIVE BEHAVIORS, CIGARETTE SMOKING IS  
9 THE ONE MOST LIKELY TO BECOME ESTABLISHED DURING  
10 ADOLESCENCE. PEOPLE WHO BEGIN TO SMOKE AT AN  
11 EARLY AGE ARE MORE LIKELY TO DEVELOP SEVERE  
12 LEVELS OF NICOTINE ADDICTION THAN THOSE WHO START  
13 AT A LATER AGE."  
14 DID I READ THAT CORRECTLY, SIR?  
15 A. YES, YOU DID.  
16 Q. AND, SIR, "PREVALENCE IN SMOKING," WHAT DOES THAT  
17 MEAN? THAT MEANS THE NUMBER OF PEOPLE?  
18 A. IT'S MY UNDERSTANDING THAT IT'S USAGE OR THE  
19 NUMBER OF PEOPLE WHO SMOKE, YES.  
20 Q. THE NUMBER OF PEOPLE WHO SMOKE.  
21 MS. CHABER: AND I BELIEVE THAT YOU HAVE GOT A  
22 MATTER, YOUR HONOR?  
23 THE COURT: YES.  
24 JURORS, DO YOU MIND JUST EXCUSING ME FOR TWO  
25 MINUTES.  
26 FOR THE RECORD, I HAVE TO ATTEND TO ANOTHER  
27 MATTER. WE'LL STILL GET IN ANOTHER 20 MINUTES.  
28 (BRIEF RECESS TAKEN)  
4486  
1 THE COURT: WE ARE BACK ON THE RECORD.  
2 MS. CHABER.  
3 MS. CHABER: Q. BEFORE I GET ON TO THAT OTHER  
4 CHART, I DON'T WANT TO GET A LITTLE CONFUSED HERE.  
5 WHEN WE WERE TALKING ABOUT ADVERTISING SPENDING  
6 AND YOU WERE TALKING ABOUT OUTDOOR, MAGAZINE, NEWSPAPER AND

7 POINT OF SALE --  
8 A. CORRECT.  
9 Q. -- POINT OF SALE ADVERTISING, IS THAT LIKE WHEN  
10 YOU WALK THROUGH THE DOOR ON A CONVENIENCE STORE AND THERE'S  
11 A MARLBORO SIGN IN THE DOORWAY THAT YOU'RE WALKING THROUGH?  
12 IS THAT CONSIDERED POINT-OF-SALE ADVERTISING?  
13 A. I DON'T KNOW WHETHER THAT'S WHAT THE FTC  
14 REQUIRED, BUT I WOULD ANTICIPATE IN MY DEFINITION THAT IT  
15 WOULD.  
16 Q. AND YOU'VE SEEN THAT, HAVE YOU NOT, SIR, WHERE  
17 YOU THERE'S A CAMEL SIGN OR A MARLBORO SIGN ON THE DOOR OF A  
18 CONVENIENCE STORE THAT YOU WALK INTO?  
19 A. WELL, I'M NOT A SMOKER, SO I DON'T SEE ANY OF THE  
20 CIGARETTE ADVERTISING WHEN I WALK INTO THOSE STORES AT ALL.  
21 I JUST -- BECAUSE THEY'RE NOT -- AS I MENTIONED  
22 EARLIER TO MR. ESCHER, THE REASON WHY I DON'T SEE THAT  
23 ADVERTISING IS IT IS NOT RELEVANT TO ME.  
24 Q. WELL, SIR, GIVEN THAT YOU ARE AN EXPERT THAT HAS  
25 COME INTO COURTROOMS TO TESTIFY ABOUT ADVERTISING AND  
26 MARKETING, WOULDN'T YOU FIND IT TO BE OF SOME VALUE TO KNOW  
27 WHERE THE ADVERTISING WAS BEING PLACED AT POINT OF SALE?  
28 A. I DON'T THINK THAT THAT'S NECESSARY FOR ME. I

4487

1 DON'T GO OUT AND CONSTANTLY LOOK FOR ADVERTISING AT A POINT  
2 OF SALE THAT WOULD AID ME IN MAKING ANY OPINION HERE.  
3 Q. WELL, SIR, I THINK YOU MENTIONED YOU'RE NOT A  
4 SMOKER.  
5 DO YOU THINK THAT A TEENAGER THAT WALKS THROUGH  
6 THE DOOR OF A CONVENIENCE STORE, WALKS THROUGH AND PUSHES ON  
7 THE MARLBORO SIGN TO GET THE DOOR OPEN, WALKS UP TO THE  
8 COUNTER TO BUY A PACK OF GUM, AND THERE'S A CAMEL RUBBER MAT  
9 WITH THE WORD "CAMEL" AND THE CAMEL SYMBOL ON IT, THAT THAT  
10 MIGHT BE NOTICED BY SOMEBODY LIKE THAT?  
11 MR. ESCHER: OBJECTION. LACK OF FOUNDATION,  
12 YOUR HONOR. BEYOND THE SCOPE OF DIRECT EXAMINATION.  
13 THE COURT: IN TERMS OF THE LACK OF THE  
14 FOUNDATION, IF HE DOESN'T KNOW, HE CAN TELL US HE DOESN'T  
15 KNOW.  
16 BUT I'M NOT SURE ABOUT IT NOT BEING BEYOND THE  
17 SCOPE.  
18 MS. CHABER: THIS GOES TO --  
19 THE COURT: GO AHEAD.  
20 MS. CHABER: THIS IS TEENAGER POINT-OF-SALE  
21 ADVERTISING.  
22 THE COURT: I'M GOING TO ALLOW IT. I'M GOING TO  
23 ALLOW IT.  
24 IF THE OBJECTION IS LACK OF FOUNDATION AS TO  
25 THAT, THE WITNESS, IF HE KNOWS, HE CAN TELL US HE KNOWS. IF  
26 HE DOESN'T KNOW, HE CAN TELL US THAT.  
27 SO I'LL ALLOW IT.  
28 MS. CHABER: DO YOU WANT TO HEAR THE QUESTION

4488

1 BACK?  
2 THE WITNESS: I THINK I BETTER.  
3 MS. CHABER: OKAY. JUDITH, PLEASE.  
4 (RECORD READ)  
5 THE WITNESS: IT IS POSSIBLE THAT THE TEENAGER  
6 WOULD NOTICE IT. BUT IT IS ALSO MORE LIKELY, BECAUSE MOST  
7 TEENAGERS ARE NOT SMOKERS, THAT IT WOULD NOT BE RELEVANT TO  
8 THEM, AND THEY WOULD NOT NOTICE IT, LIKE I DON'T NOTICE AS A  
9 NONSMOKER.  
10 MS. CHABER: Q. SIR, WOULDN'T YOU EXPECT THAT  
11 IF TEENAGERS' FRIENDS, WHICH YOU SAY IS THE MOST IMPORTANT

12 FACT OF THE INITIATION OF SMOKING, WERE SMOKING, THAT A  
13 NONSMOKING FRIEND WALKING THROUGH THE CONVENIENCE STORE DOOR  
14 AS I'VE DESCRIBED AND UP TO THE COUNTER MIGHT NOTICE THOSE  
15 THINGS?

16 A. I'M SORRY. I DON'T WANT -- I REALLY DON'T  
17 UNDERSTAND THE QUESTION THE WAY IT'S WORDED.

18 YOU SAID SOMETHING ABOUT A SMOKER AND A  
19 NONSMOKER, AND IT'S A NONSMOKER WHO WALKS IN AND THESE ARE  
20 THE THINGS THAT ARE THERE, AS YOU'VE DESCRIBED THEM, THE  
21 SIGN OF THE MARLBORO TO PUSH THE DOOR OPEN, AND THE CAMEL  
22 THING, AND THEY'RE A NONSMOKER, THE HIGH PROBABILITY IS THAT  
23 IT WOULD NOT BE RELEVANT TO THEM. THEY WILL NOT SEE IT. AS  
24 I DESCRIBED, I DON'T SEE IT.

25 Q. SIR, IS IT ONLY THE PEOPLE THAT ARE ALREADY USING  
26 PRODUCTS THAT NOTICE THE ADVERTISING FOR THOSE PRODUCTS? IS  
27 THAT WHAT YOUR TESTIMONY IS?

28 A. NO, THAT IS NOT.

4489

1 WHAT MY TESTIMONY IS, I'M SAYING THAT IN MANY  
2 CASES, PEOPLE DO NOT -- OR FILTER OUT ADVERTISEMENTS FOR  
3 PRODUCTS THAT THEY THAT ARE NOT RELEVANT TO THEM, SUCH AS I  
4 SUGGESTED TO MR. ESCHER.

5 I DO NOT SEE CAR ADVERTISING THESE DAYS, SIMPLY  
6 BECAUSE IT IS NOT RELEVANT TO ME.

7 Q. WELL, SIR, IF A TEENAGER IS CURIOUS ABOUT SMOKING  
8 AND HAS A FRIEND THAT SMOKES, MIGHT NOT THAT ADVERTISING  
9 BECOME RELEVANT FOR THAT TEENAGER?

10 MR. ESCHER: OBJECTION, YOUR HONOR. LACK OF  
11 FOUNDATION. IT OVERTLY CALLS FOR SPECULATION.

12 THE COURT: WHAT MIGHT HAPPEN DOES. SUSTAINED.

13 MS. CHABER: Q. SIR, YOU'RE NOT SAYING THAT  
14 THE TEENAGER WHO IS A PRESMOKER, SOMEONE WITH WHAT YOU'VE  
15 INDICATED ARE THE CHARACTERISTICS THAT MIGHT GET THEM TO  
16 START SMOKING, IS NOT AFFECTED IN ANY WAY, SHAPE OR FORM BY  
17 ADVERTISING, ARE YOU?

18 MR. ESCHER: OBJECTION. VAGUE AS TO THE TERM  
19 "PRESMOKER," YOUR HONOR.

20 THE COURT: I UNDERSTAND IT.

21 DID YOU UNDERSTAND THE QUESTION?

22 THE WITNESS: I REALLY DO NOT UNDERSTAND THE  
23 TERMINOLOGY "PRESMOKER," BECAUSE IT ANTICIPATES THAT  
24 SOMEBODY, YOU KNOW, IS GOING TO SMOKE BUT THEY JUST HAVEN'T  
25 STARTED YET.

26 THE COURT: THEN YOU ARE GOING TO NEED TO  
27 REPHRASE IT.

28 MS. CHABER: Q. DR. MARTIN, YOU THINK THAT

4490

1 THERE ARE CERTAIN ADOLESCENTS WHO ARE SUSCEPTIBLE TO  
2 STARTING SMOKING, DON'T YOU?

3 A. NO, I DO NOT SUBSCRIBE TO THE THEORY OF  
4 SUSCEPTIBILITY.

5 Q. SO ALL OF THESE FACTORS THAT YOU PUT UP, ABOUT  
6 THE PEERS AND THE FAMILY AND OTHER RISK-TAKING BEHAVIOR,  
7 THAT DOESN'T MAKE AN INDIVIDUAL SUSCEPTIBLE IF THEY'VE GOT  
8 THOSE THINGS IN THEIR BACKGROUND?

9 MR. ESCHER: OBJECTION TO "THOSE THINGS IN THEIR  
10 BACKGROUND."

11 THE COURT: WHAT ARE THE THINGS IN THE  
12 BACKGROUND?

13 MS. CHABER: I JUST NAMED THEM.

14 THE COURT: YOU DID IT BY SAYING "ALL THESE  
15 FACTORS THAT YOU PUT UP" ABOUT SOMETHING, AND I'M NOT SURE  
16 IT'S CLEAR.



17 DO YOU UNDERSTAND WHAT SHE MEANS?  
18 THE WITNESS: NO, I DON'T.  
19 THE COURT: I DON'T EITHER.  
20 MS. CHABER: WELL, I'M OUTVOTED. THERE'S NO  
21 QUESTION ABOUT THAT.  
22 THE COURT: THIS IS WITHOUT PREJUDICE TO YOUR  
23 QUESTION.  
24 MS. CHABER: WITHOUT PREJUDICE TO MY TRYING TO  
25 MAKE THIS BETTER.  
26 Q. SIR, YOU TESTIFIED THAT THERE ARE CERTAIN FACTORS  
27 ASSOCIATED WITH SMOKING INITIATION AMONG THE YOUNG; CORRECT?  
28 A. THAT'S CORRECT.

4491  
1 Q. SO LET'S ASSUME A PERSON WHO HAS SOME PEERS WHO  
2 SMOKE AND A SIBLING THAT SMOKES.  
3 IS OR IS NOT THAT PERSON SUSCEPTIBLE TO  
4 INITIATING SMOKING?  
5 A. I WOULD NOT USE THE WORD "SUSCEPTIBLE."  
6 Q. WHAT WORD WOULD YOU USE?  
7 A. I WOULD SAY THAT THOSE PEOPLE HAVE BEEN EXPOSED  
8 TO FRIENDS SMOKING, HAVE BEEN EXPOSED TO OLDER SIBLINGS  
9 SMOKING, AND THAT WE CLEARLY UNDERSTAND THAT THOSE ARE  
10 FACTORS THAT ARE ASSOCIATED WITH SMOKING.  
11 BUT THAT DOES NOT PREDICT THAT THE PERSON WILL  
12 ENGAGE IN SMOKING.  
13 Q. SIR, IF SOMEBODY HAS FRIENDS THAT SMOKE AND EASY  
14 ACCESS TO CIGARETTES, DO YOU THINK THAT A PERSON WHO HAS  
15 EASY ACCESS TO CIGARETTES, HAS FRIENDS THAT SMOKE, IS  
16 UNDERAGE, IS LIKELY TO START SMOKING?  
17 A. NO, I WOULD NOT.  
18 AND THE REASON I WOULD SAY THAT, YOU KNOW, IS THE  
19 WORD "LIKELY." YOU NEED A MORE CLEAR DEFINITION OF WHAT YOU  
20 MEAN BY "LIKELY."  
21 BUT THE SECOND PART OF IT IS, THERE IS TOO MUCH  
22 EVIDENCE TO INDICATE THAT THERE ARE PEOPLE WHO YOU HAVE  
23 DESCRIBED WHO HAVE NOT ENGAGED IN SMOKING BEHAVIOR.  
24 AND INCIDENTALLY, I HAPPEN TO BE MARRIED TO ONE  
25 OF THOSE PEOPLE, WHO HAD READY ACCESS, WAS IN A HOUSEHOLD  
26 WHERE PARENTS SMOKED AND ALSO HAD A BOYFRIEND, ME, WHO  
27 SMOKED.  
28 Q. AND IN FACT, YOU DID THAT IN SPITE OF THE FACT

4492  
1 THAT YOU REPORTED ON THE NEWS, AND IN SPITE OF THE FACT THAT  
2 YOU REPORTED ON THE SURGEON GENERAL'S REPORT IN 1964? YOU  
3 CONTINUED SMOKING UNTIL 1971; ISN'T THAT TRUE?  
4 A. I'M TRYING -- I'M TRYING TO LAY -- I THINK IT WAS  
5 ABOUT 1971 THAT I STOPPED SMOKING, YES.  
6 Q. AND SIR, YOU DIDN'T STOP SMOKING AT THAT POINT  
7 FOR HEALTH REASONS. YOU STOPPED SMOKING BECAUSE YOU HAD A  
8 NEW DAUGHTER; , RIGHT?  
9 A. NO, THAT'S NOT TRUE.  
10 I JUST -- I KNOW WHERE YOU'RE GOING WITH THAT.  
11 BUT THE ONLY REASON WHY I SAY "A NEW DAUGHTER" IS BECAUSE I  
12 CAN TRACE IT TO THE TIME WHEN MY DAUGHTER WAS BORN.  
13 THAT'S A MEMORY THING THAT I USE.  
14 Q. OH, OKAY.  
15 SO YOU DIDN'T STOP SMOKING EITHER FOR HEALTH  
16 REASONS OR BECAUSE YOUR DAUGHTER WAS BORN. IT'S JUST THAT  
17 YOU CAN ASSOCIATE THE DATE OF STOPPING SMOKING WITH THE  
18 BIRTH OF YOUR DAUGHTER; IS THAT FAIR TO SAY?  
19 A. APPROXIMATELY.  
20 MR. ESCHER: OBJECTION. RELEVANCE TO HIS  
21 SMOKING HISTORY, YOUR HONOR.

22 MS. CHABER: HE BROUGHT IT UP, YOUR HONOR.  
23 THE COURT: I'LL ALLOW IT.  
24 THE WITNESS: APPROXIMATELY 30 YEARS AGO -- MY  
25 DAUGHTER IS 30 -- I STOPPED SMOKING.  
26 I DID NOT SAY I DIDN'T STOP FOR HEALTH REASONS.  
27 I JUST SAID I STOPPED SMOKING, OR YOU DID. YOU TOLD ME I  
28 STOPPED SMOKING.  
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1 MS. CHABER: Q. WELL, I BELIEVE, SIR, THAT I  
2 GOT THAT FROM TESTIMONY THAT YOU HAD GIVEN PRIOR UNDER OATH.  
3 DO YOU RECALL TESTIFYING THAT --  
4 I WILL LAY A FOUNDATION.  
5 THE COURT: YOU SHOULDN'T MAKE STATEMENTS LIKE  
6 THAT.  
7 MR. ESCHER: OBJECTION, YOUR HONOR.  
8 ARGUMENTATIVE.  
9 THE COURT: IT IS. SUSTAINED.  
10 MS. CHABER: Q. SIR, DO YOU RECALL TESTIFYING  
11 PREVIOUSLY THAT YOU DID NOT STOP SMOKING FOR HEALTH REASONS?  
12 A. I DO NOT RECALL THAT, NO.  
13 THE COURT: LET ME JUST SAY WE'RE NEAR THE TIME  
14 TO RECESS. IF YOU HAVE A SHORT SUBJECT YOU CAN DO IN A  
15 COUPLE OF MINUTES, THAT'S FINE.  
16 MS. CHABER: WHY DON'T WE RECESS NOW. IT'S  
17 CLOSE ENOUGH TO THE HOUR.  
18 THE COURT: OKAY. JURORS, OVER THE WEEKEND,  
19 PLEASE DO NOT DISCUSS THIS CASE WITH ANYONE OR LET ANYONE  
20 DISCUSS IT WITH YOU. PLEASE DO NOT FORM OR EXPRESS ANY  
21 OPINIONS ABOUT CASE. HAVE A GOOD WEEKEND.  
22 MONDAY MORNING, I WOULD LIKE TO START AT 9:00  
23 O'CLOCK. I NEED TO GET IN SOME FULL DAYS NEXT WEEK TO BE  
24 FAITHFUL TO THIS ESTIMATE THAT I HAVE GIVEN YOU, WHICH IS WE  
25 ARE GOING TO GET THE CASE TO YOU IN THE FOLLOWING WEEK.  
26 I LOOK FORWARD TO SEEING YOU ALL BY 9:00 O'CLOCK  
27 ON MONDAY MORNING. SEE YOU THEN. GOOD NIGHT.  
28 (THE PROCEEDINGS ADJOURNED AT 4:55 P.M.)

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